Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

**Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc.,**

***Petitioners,***

***versus***

**Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc.,**

***Respondents.***

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the trial court's Order was properly appealable.

2. Whether the RICO counts of the Plaintiffs' Complaint were time- barred.

3. Whether the appellate panel was improperly constituted.

4. Whether Defendants J.R. Horn and U.S. Mortgage & Trust Company were properly served with process.

**IN THE SUPREME COURT OF THE UNITED STATES**
**October Term 2005**
**No._____**

**Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc., Petitioners**

**v.**

**Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc., Respondents**

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc., the Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 11, 2005

## OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix G) was entered on July 27, 2005; that court filed an amended judgment on October 11, 2005; that court denied the Petitioners' Petition for Rehearing on January 26, 2006.

## JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(i).

## PARTIES

Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc., Inc., Petitioners.

Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc., Respondents.

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## STATUTES INVOLVED

18 U.S.C. § 1951

18 U.S.C. § 1961, *et seq.*

## STATEMENT OF THE CASE

**Procedural history.**

This action arises out of a Complaint filed in Nelson Circuit Court on November 13, 2002 by Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J. Pulliam, Inc. (hereafter "Plaintiffs") against the Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc.[1] (hereafter "Defendants").

That Complaint alleges generally that the Defendants have violated the Hobbs Act, 18 U.S.C. § 1951, and the RICO Act, 18 U.S.C. § 1961, *et seq.*, in their settlement of action No. 88-CI-00812, Jefferson Circuit Court, *Barnett Bank of Tampa, N.A. v. Peoples State Bank, Chaplin, Kentucky,* and in their prosecution of action No. 3:90CV-0367-J, United States District Court for the Western District of Kentucky, *Ohio Casualty Insurance Co. v. Warren L. Pulliam,* and in their prosecution of action No. 93-CI-00130, Nelson Circuit Court, *Ohio Casualty Insurance Co. v. Warren L. Pulliam, et al.* The Complaint also alleges various supplemental causes of action arising under state law.

On December 13, 2002, the Defendants removed this action to the United States District Court for the Western District of Kentucky, Louisville Division, on the basis of federal question

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1. Defendants J. R. Horn a/k/a Marion A. Horn, Jr., and United States Mortgage and Trust Company, Inc. did **not** answer, plead, or otherwise respond to the Complaint. A number of the other Defendants have suggested that Horn and U.S. Mortgage & Trust were **not** properly served with process. The adequacy of that service of process is one of the issues raised upon this Appeal.

jurisdiction. Each of the respective Defendants, **except** Defendants Horn and U.S. Mortgage & Trust Co., in lieu of answering, moved the district court, pursuant to Rule 12(b)(6), F.R.C.P. and/or Rule 56, F.R.C.P., either to dismiss the action or to grant summary judgment against the Plaintiffs.

On September 12, 2003, and while the aforesaid Motions were pending before the district court, the Plaintiffs filed their First Amended Complaint.[2] On September 25, 2003, the district court issued an Order dismissing the Plaintiffs' federal counts, and remanding the state counts to Nelson Circuit Court.[3] A number of the Defendants filed timely Motions, pursuant to Rule 59(e), F.R.C.P., to Alter of Amend that Order. Those Motions were denied by Order dated July 16, 2004.

Plaintiffs then appealed to the United States Court of Appeals for the Sixth Circuit. That court denied their appeal by Order dated July 27, 2005. The court filed an Amended Order of Dismissal on October 11, 2005. Plaintiffs filed a timely Petition for Rehearing, which was denied by Order dated January 26, 2006. This Appeal followed.

**Relevant facts.**

The events which form the basis of this action occurred in the fall of 1986. During that time, Warren L. Pulliam (hereafter "Pulliam") was the president of Peoples State Bank, Chaplin, Kentucky (hereafter "Peoples Bank"). The Pulliam family had owned a majority of the stock of Peoples Bank since the 1950's. In 1984, Warren L. Pulliam and James O. King (hereafter "King"), the bank's C.P.A., each purchased one-half of the stock in Nelson Bancorp, which owned the bank, from Warren Pulliam's brother, E.H. Pulliam. King also purchased one-half interrest in the Chaplin Insurance Agency, Inc., from Warren L. Pulliam.

In the spring of 1986, Donald R. Tibbitts (hereafter "Tibbitts") and Ben Mirzaian (hereafter "Mirzaian"), agents of the Prudential Insurance Company of America and of Prudential-Bache Securities, Inc. (hereafter collectively referred to as "Prudential") appeared in the Chaplin area promoting a number of

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2. The Amended Complaint contained an additional count, Count XIV, which requested a declaratory judgment.

3. Nelson Circuit Court has stayed all further proceedings in the remanded action pending the outcome of this Appeal.

investment schemes. During the ensuing ten months, they sold over $1,600,000.00 of fraudulent securities in the Chaplin area.

During the course of these activities, both Tibbitts and Mirzaian opened business accounts at the Peoples Bank. On April 4, 1986, Tibbitts invested $400,000.00 of Peoples Bank's funds in Prudential securities. On April 7, 1986, Tibbitts assigned $40,000.00 to Peoples Bank as a guarantee that this investment would yield a return of at least 10%. In November, 1986, Pulliam issued certified checks in excess of $800,000.00 for Tibbitts and Mirzaian. These checks were covered by funds transmitted to Peoples Bank from Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank"). These funds were secured by an irrevocable letter of credit issued by Prudential to Barnett Bank and by one million shares of common stock in Video Communications, Inc. which had been assigned to Barnett Bank by the United States Mortgage and Trust Company, Inc., which owned the stock.

On December 3, 1986, Tibbitts deposited to the account of Peoples Bank at Liberty National Bank (Peoples' correspondent institution) a check drawn on Douglas A. Murdock (hereafter "Murdock") at Barnett Bank in the amount of $460,000.00. Also on December 3, Tibbitts deposited to the same account a check drawn on Tibbitts' account at BankOne of Lexington in the amount of $275,000.00. Both of these checks were dishonored by the drawee banks for insufficient funds.

On December 14, 1986, Pulliam demanded that Tibbitts furnish security to cover the certified checks. Tibbitts thereupon caused Murdock to tender to Pulliam 1,000,000 shares of common stock in Video Communications, Inc. as collateral for Peoples Bank. This stock was assigned to Peoples Bank by the United States Mortgage and Trust Company, Inc., owners of said stock. This stock was worth more than three dollars per share on that date.[4]

On December 16, 1986, Barnett Bank wire-transferred $100,000.00 to Peoples Bank despite its knowledge that problems existed on December 3, 1986, because Barnett Bank had

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4. This represents the value of shares traded on what was then known as the "pink slip exchange, now NASDAQ. The actual value of the shares may have been much greater. The company's principal asset was a certificate of deposit, assigned to Video Communications by its parent company, U.S. Mortgage & Trust Co., Inc. drawn on the Mitsui Bank of Tokyo, Japan, and valued at $1.2 billion. Since there were 20 million shares outstanding, this stock represented 1/20th of the total number of shares. The actual value of this stock, therefore, appears to have been 1/20th of $1.2 billion, or $60 million.

dishonored the prior check of its customer, Murdock, in the amount of $460,000.00. On December 18, 1986, after Barnett Bank knew that Pulliam had been dismissed as President of Peoples Bank because of these transactions, it nevertheless wire-transferred an additional $75,000.00 to Peoples Bank. On December 19, 1986, Barnett Bank wire-transferred a further $261,000.00 to Peoples Bank.

Upon learning of the shortfall at Peoples Bank on December 16, 1986, Pulliam's associate, King coerced Pulliam to meet with him and with his attorneys James Straus and Charles F. Pritchett, Jr. (hereafter "Straus" and "Pritchett") within the next twenty-four hours. This meeting took place on December 16, 1986, at 5:00 p.m. at the law offices of Brown, Todd & Heyburn, P.L.L.C. (now Frost Brown Todd, LLC) in Louisville, Kentucky.

King instructed Pulliam to bring with him all of his shares of stock in Nelson Bancorp, Inc., which owned Peoples Bank; this constituted fifty percent of the total number of shares of Nelson Bancorp, Inc. King, Straus and Pritchett met with Pulliam and persuaded him (1) to execute a restitution agreement, (2) to surrender his certificates of stock in Nelson Bancorp, Inc. to King, and (3) to tender to King an option to purchase this stock for less than its actual value.

King, Straus and Pritchett also induced Pulliam (4) to sign a restitution agreement by which he covenanted to indemnify Peoples Bank for any losses it might sustain because of the certified checks which Pulliam had issued. Straus and Pritchett induced Pulliam to sign the restitution agreement which they had already prepared while Pulliam was without counsel by purporting to be his counsel. Tibbitts, Mirzaian, and Pulliam were subsequently convicted of bank fraud.

In February, 1988, Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank") filed an action against Peoples Bank in Jefferson Circuit Court in Louisville, Kentucky. Barnett alleged that its loss had been $835,000.00. Neither Barnett Bank nor Peoples Bank impleaded Pulliam as a party to that action, although Peoples Bank had stated in its answer that Pulliam was a necessary and indispensable party. Through pre-trial discovery, Peoples learned that Barnett's actual loss had been only $633,500.00, rather than the amount set out in its pleading. However, neither Peoples nor Barnett advised the Jefferson Circuit Court of this fact, nor did Barnett amend its complaint to correct the error. In fact, Barnett resisted disclosing this fact to Peoples, and after being forced by court order to disclose the actual amount of its loss, Peoples and Barnett secured no fewer than five protective orders from the court

to insure that no one else would become aware of this fact.

After Barnett had been forced to disclose the true amount of its loss, Barnett and Peoples immediately began negotiations for settlement of the action. Peoples also filed a proof of loss claim with Ohio Casualty Insurance Company, through whom it was bonded.[5] Ohio Casualty participated fully in the settlement negotiations. Its counsel then repeatedly denied that Ohio Casualty had been a party to those negotiations.

Neither Peoples Bank nor Ohio Casualty offered to allow Pulliam to assume defense of the action. On Friday, April 14, 1989, less than a month after Barnett had been forced to reveal the actual amount of its loss, Ohio Casualty's Surety and Fidelity Claims Representative, William T .omas, Jones (hereafter "Jones") visited Pulliam at his insurance office at Chaplin, Kentucky and advised him that settlement negotiations were in progress. Jones then asked whether Pulliam would be interested in contributing to the settlement offer.

Pulliam asked Jones what settlement terms were being proposed, and Jones declined to disclose that information to Pulliam. When Pulliam indicated that he wished to defend the action, Jones terminated the discussion, and on the following Monday prepared a "Memo to File" which noted Pulliam's desire to defend the action and suggested that a better course would be for Ohio Casualty and Peoples State Bank to settle the action without allowing Pulliam to participate, and then recoup the entire amount of the settlement from Pulliam.

Pulliam, through his attorney, subsequently offered to contribute to any settlement offer, and was told that Ohio Casualty and Peoples would "get back to" him. Pulliam, accordingly, waited to receive further word concerning the settlement negotiations. Ohio Casualty and Peoples, however, concluded their settlement negotiations with Barnett Bank without further contacting Pulliam, who first learned of the settlement when he received a demand letter from Ohio Casualty asking him to reimburse Ohio Casualty for the amount of the settlement. Pulliam responded that he was under no obligation to repay Ohio Casualty, since he had not

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5. This proof of loss statement erroneously set out the amount of Barnett's loss as $835,000.00. Four months after filing the statement, Peoples learned that the actual amount of Barnett Bank's loss had only been $633,500.00. However, when Ohio Casualty filed suit against Pulliam in federal district court two years later, long after it had discovered the true amount of Barnett's loss, Ohio Casualty included this proof of loss statement containing the erroneous amount, as a part of its complaint.

agreed to the settlement terms.

Ohio Casualty then filed a collection action against Pulliam in the United States District Court for the Western District of Kentucky. That case came on for jury trial on June 30 - July 3, 1992. During the course of that trial, Peoples Bank's counsel, Charles F. Pritchett, Jr., appeared as a witness for Ohio Casualty, and testified that the total amount of Barnett Bank's loss had been $834,000.00, although he necessarily knew that the correct figure was $633,500.00.[6] Mr. Pritchett also stated that Barnett Bank had told him that the Video Communications stock which both Barnett and Peoples were holding as collateral, was "worthless", although Barnett had, in fact, provided him with documents showing that "Barnett brokerage" had estimated the stock's value at six million dollars.[7] As noted above, *see,* footnote 4, *supra,* the actual value of this collateral may have been as much as $120 million.

Mr. Pritchett also testified that Barnett had told him that a letter of credit executed by Prudential-Bache Securities in the amount of $700,000.00, which it had been holding as collateral, "was bogus", when Pritchett well knew that Barnett had not only insisted that the certificate of deposit was genuine, but had also collected $282,500.00 based, at least in part, on the genuineness of that certificate. Mr. Pritchett also testified that he did not know whether Prudential had any right of reimbursement against Barnett Bank when, in fact, he had in his possession a copy of the agreement between Prudential and Barnett and must necessarily have known whether or not it provided for reimbursement.

At the conclusion of the trial, the jury awarded judgment against Pulliam in the amount of $200,000.00. Pulliam subsequently, on October 17, 1995, filed a motion, pursuant to

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6. Barnett had claimed a loss of $835,000.00. In his testimony, Pritchett pointed out that Barnett had miscalculated, and that the figures it had alleged totaled $834,000.00, rather than $835,000.00. While noting this one thousand dollar discrepancy, Pritchett failed to advise the jury that Barnett had overstated the amount of its loss by some $201,500.00.

7. In this same document, Mr. Hacia, Assistant Vice President of Barnett Bank (hereafter "Hacka ),also stated that the loss of Barnett's funds had been entirely his fault, due to his failing to follow Barnett Bank guidelines, and transmitting the funds to Peoples Bank before having received payment on the Excellence Land check from First Union Bank. **Hacia repeated this assertion at his deposition on December 7, 2002.** Hacia's admission against interest would obviously have been available to Peoples Bank, and to Pulliam, as a defense to the Jefferson Circuit Court action. Peoples, however, elected not to defend the action, and concealed this vital piece of exculparoty evidence from Pulliam, its indemnitor.

Rule 60(b), F.R.C.P., asking the court to set aside that judgment. The motion was denied by order dated October 7, 1996. Pulliam appealed that denial to the United States Court of Appeals for the Sixth Circuit, action No. 96-6522, *Warren L. Pulliam v. Ohio Casualty Insurance Company*. That court denied that appeal by order dated June 23, 1999. In its opinion, the court stated:

> Plaintiff failed to explain the lengthy delay, and **he failed to produce evidence** to support his extraordinary motion. In fact, Plaintiff conceded that he could not prove the fraud he alleged.

Order of 6/23/99 (emphasis added).

Pulliam inferred from the Court's statement that, if he **had** been able to prove the fraud which he had alleged, he would have prevailed. Pulliam, therefore, sought to obtain the evidence necessary to prove his case. In April, 1997, Pulliam and his co-defendants in the Nelson Circuit Court action (Petitioners here) filed a RICO action against Ohio Casualty, the Prudential defendants, and Barnett Bank in the United States District Court for the Middle District of Florida, action # 97-CV-846,*Warren L. Pulliam, et al. v. Ohio Casualty Insurance Company, et al.*

In their complaint, the plaintiffs alleged that Barnett "had entered into a settlement agreement with Defendant Prudential" and that when Barnett had subsequently sued Peoples State Bank for the entire amount of its loss, Barnett had been "attempting to obtain a double recovery." However, beyond the bare allegation that the plaintiffs believed there had been such a settlement, they were unable to plead any specific facts to support that claim.

Both Prudential and Ohio Casualty moved to dismiss the Florida complaint for failure to state a claim upon which relief could be granted. Among the grounds urged for dismissal, Prudential and Ohio Casualty argued that the plaintiffs had failed to allege sufficient facts. Plaintiffs thereupon agreed to a voluntary dismissal without prejudice to reinstate their cause of action at a later date. This order was entered on October 14, 1997.

Ohio Casualty had, in the meantime, filed a collection action in Nelson Circuit Court, 93-CI-00130, *Ohio Casualty Insurance Co. v. Warren L. Pulliam, et al.* In addition to Warren L. Pulliam, Ohio Casualty named as parties defendant Pulliam's wife, his son, his insurance agency, an employee of that agency, Paul A. Sims, and Pulliam's corporation, W & J Pulliam, Inc.

Pulliam and his co-defendants in that case (the instant

Petitioners) undertook extensive discovery, which was vigorously resisted by Ohio Casualty. As a result, although that case has now been pending for more than thirteen years, and has been vigorously litigated by the defendants (Plaintiffs here), it has not yet come to trial. On July 14, 2000, after a year-long fight in which Ohio Casualty resisted the defendants' request for production of documents, Ohio Casualty provided a large number of documents which had not previously been available to the defendants (Plaintiffs here). These documents showed conclusively that Ohio Casualty and Peoples State Bank had, in fact, been guilty of fraud and collusion to settle the Jefferson Circuit Court action to Pulliam's detriment, without securing his consent to the settlement terms, and to then force him to pay the full amount of that judgment.

In 1999, when they requested the production of documents, Pullliam and his co-defendants had noticed the deposition of Ohio Casualty's designated representative, for the purpose of verifying and explaining the documents thus produced. This notice of deposition was opposed, by various means, and it was not until nearly two years after the production of documents, and nearly three years after the deposition had first been noticed, that Ohio Casualty's designated representative appeared and was asked to verify the documents thus produced.

However, when Ohio Casualty's designated representative, Thomas Caldwell, finally sat for deposition on April 17, 2002, he testified that he had **no** knowledge whatever about the matters concerning which he had been subpoenaed to testify; nor did he provide any documents in response to the subpoena *duces tecum* which had been served upon Ohio Casualty. He was, consequently, unable to authenticate the documents which Ohio Casualty had provided in document production nearly two years earlier. However, the defendants (Petitioners here) had also subpoenaed Mr. Caldwell's predecessor as Fidelity and Surety Claims Manager, William Thomas Jones, and Mr. Jones was able to verify and explain many of the documents.

After taking these depositions, the Petitioners then moved Nelson Circuit Court for leave to file a counterclaim against Ohio Casualty, based upon the new evidence which had been provided by Ohio Casualty, and to implead the other instant Respondents as third party defendants in the Nelson Circuit Court action. Hon. Larry Raikes, Nelson Circuit Judge, denied the Motion and indicated that the matter ought to have been brought as a separate action. The Petitioners, accordingly, filed the instant action in Nelson Circuit Court.

As noted above, the Respondents removed the action to the United States District Court for the Western District of Kentucky, and moved to dismiss the action for failure to state a claim upon which relief could be granted, and for summary judgment. That court dismissed the federal counts, and remanded the state counts to Nelson Circuit Court. This appeal followed.

## REASONS FOR GRANTING THE WRIT

### 1. Plaintiffs' claims are not time-barred.

Judge Coffman held that the Plaintiffs' RICO claims were barred by the applicable statutes of limitation. Her reasoning on this point was as follows:

> The plaintiffs argue that they were not aware of the facts allegedly concealed by the defendants until after receiving documents from Ohio Casualty during discovery. The fact that was allegedly concealed is that Prudential reimbursed Barnett in the amount of $282,500 prior to Barnett's 1989 complaint against Peoples; the plaintiffs allege that this payment demonstrates that Barnett had already recovered its damages from the Tibbitts fraud and that the suit against Peoples was an attempt to obtain a double recovery for its injuries. The plaintiffs allege that this fact would have provided Peoples and Pulliam a defense to the Barnett claim and that it would have provided Pulliam with a defense to the 1990 Ohio Casualty suit.
>
> If the plaintiffs had not discovered that Barnett had been reimbursed by Prudential until after the document production in 2000, their RICO claims would not be barred by the statute of limitations. The plaintiffs, however, were aware of the settlement between Prudential and Barnett when they filed a complaint against Ohio Casualty, Barnett, and the Prudential defendants in April 1997. The plaintiffs specifically alleged the following in paragraph 26w of the Tampa complaint:

> The fact that Defendant Ohio Casualty knew or should have known that Defendant Barnett Bank had entered into a settlement agreement with Defendant Prudential, and that Peoples had alleged in the underlying action, that Defendant Barnett Bank had already received restitution from Defendant Prudential and was attempting to secure "a double recovery from Peoples Bank."

The Tampa complaint demonstrates that the plaintiffs had actual knowledge of the Prudential-Barnett settlement in April 1997. *See New England Health Care Employees Pension Fund,* 336 F.3d at 501-02 (finding that prior complaint demonstrated either actual or constructive knowledge of fraud for purpose of dismissal under Rule 12(b)(6) motion and statute of limitations). While the plaintiffs may not have known the exact amount of the settlement until 2000, the plaintiffs did know that Prudential had paid Barnett some amount.

**Because the plaintiffs discovered their injury in April 1997** at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. The instant action, however, was not filed until November 2002. Because the statute of limitations is four years, the plaintiffs are barred from pursuing a RICO claim for any injury that was discovered or should have been discovered by November 1998.

Order at 27-29 (emphasis added).[8]

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8. As noted above, Ohio Casualty and Prudential moved to dismiss the Florida action on the grounds that it did not allege sufficient facts to state a claim. In the instant action, they argued, and Judge Coffman agreed, that the facts set out in the Florida action had been fully adequate to state a claim for RICO violations. **The defendants should not have been allowed to "have it both ways."** Having

Respectfully, Plaintiffs insist that Judge Coffman misapprehended the law on this point. It is elementary that limitation does not run where the cause of action has been fraudulently concealed by the defendant and is not discovered by the plaintiff until after the statutory period has expired. *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612, 614 n. 7 (5th Cir. 1963). This equitable doctrine, known as the "discovery rule," is to be applied circumspectly on a case-by-case basis. When doing so,

> the court must identify, evaluate, and weigh the interests of the opposing parties, balancing the hardship on the plaintiff caused by the bar of his suit against the burden on the defendant to obtain proof of his defense.

*Pan American Petroleum Corp. v. Orr*, 319 F.2d 612, 614 n. 7 (5th Cir. 1963).

The holding of the Sixth Circuit, *New England Health Care Employees Pension Fund v. Ernst & Young*, 336 F.3d 495 (6th Cir. 2003), cited by Judge Coffman (Opinion at 28), is instructive in this regard. Judge Nelson, writing for the Court, explained:

> Before we turn to the application of § 9(e) [of the Securities Exchange Act of 1934, 15 U.S.C. § 78] to the facts of this case, we need to consider when the limitations period begins to run under an "inquiry notice" standard. Ernst suggests that the limitations period is triggered when the plaintiff learns facts that would cause a reasonable investor to investigate the possibility of fraud. Some cases support that suggestion. The majority view, however, is that knowledge of suspicious facts – "storm warnings," they are frequently called – merely triggers a duty to investigate, and that **the limitation period begins to run only when a reasonably diligent investigation would have discovered the fraud.** This view, we believe, reflects an appropriate balance between "the staunch federal interest in requiring plaintiffs to

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argued in the Florida action that the facts alleged there were inadequate to state a claim, and having obtained the plaintiffs' acquiescence to that opinion, the Defendants should not have then been permitted to argue the converse in the Kentucky action.

> bring suit promptly . . . and the equally strong interest in not driving plaintiffs to bring suit . . . before they are able, in the exercise of reasonable diligence, to discover the facts necessary to support their claims." We conclude, in accordance with the majority view, that the § 9(e) limitations period begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the facts underlying the alleged fraud.

*New England Health Care Employees Pension Fund v. Ernst & Young*, 336 F.3d at 501 (citations omitted).

When they filed the Tampa action in 1997, **the Plaintiffs had learned**, from the trial testimony of Charles F. Pritchett, Jr., Esq., the bare fact that Barnett Bank and Prudential had reached a settlement, and that Barnett Bank had been paid an undisclosed sum pursuant to that agreement. At the trial, Mr. Pritchett declined to disclose the amount paid, and Judge Johnstone did not require him to do so. The Plaintiffs also knew that Peoples Bank's counsel, Mr. Pritchett, had argued in a Motion to Compel Production of that settlement agreement, that this sum might be available to Peoples as a set-off against the amount Barnett was seeking to recover.[9]

However, since the Jefferson Circuit Court action was settled pursuant to an agreement of the parties, who then obtained no fewer than five separate protective orders to assure that no one else (including Warren Pulliam, from whom Peoples Bank and Ohio Casualty intended to seek a full recovery) could gain access to that settlement agreement, the Plaintiffs were not able to ascertain whether the sum recovered from Prudential by Barnett Bank was, in fact, available as a set-off for the amount which Barnett had sought to recover from Peoples. The Plaintiffs had obtained only enough information to make it appear possible that such was the case.

The Sixth Circuit's holding in *New England Health Care* makes it clear that such a quantum of information does not suffice

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9. In that memorandum, Pritchett further stated that Barnett Bank's counsel had asked him **"to breach his ethical obligation" to his client**, Peoples Bank, by offering to show him a copy of the Prudential-Barnett settlement, on condition that Pritchett not disclose the terms of that agreement to his client. Of course, Pritchett's allegation is further evidence that Barnett Bank was attempting to obtain a collusive settlement in violation of the rights of Peoples Bank and its indemnitor, Warren Pulliam.

to trigger the running of limitations. As one treatise has succinctly noted: "There must be more than mere suspicion." CALVIN W. CORMAN, LIMITATION OF ACTIONS § 11.51 at n. 10 (1991), *citing, L.C.L. Theatres v. Columbia Pictures Indus.*, 566 F.2d 494, 497 (5th Cir. 1978).

The facts of which the Plaintiffs were aware in April, 1997 were, in the words of the Sixth Circuit, "storm warnings" which clearly placed the Plaintiffs on inquiry notice. The Plaintiffs did, in fact, undertake a diligent inquiry. **Both Prudential's attorney, William W. Allen, Esq., and Ohio Casualty's attorney, Timothy D. Martin, Esq., asserted that no such agreement existed.**[10] This concealment prevented the Plaintiffs from discovering sufficient facts to state a cause of action until July 14, 2000, when Ohio Casualty finally produced a copy of the settlement agreement; and it prevented the Plaintiffs from verifying the authenticity of the documents until April 17. 2002.[11]

Such concealment, which prevents a plaintiff from discovering the necessary facts despite his having made a reasonable investigation, clearly tolls the running of the statute of limitations.

> Under the federal equitable tolling doctrine, concealment of fraudulent conduct tolls the running of the statute of limitations in favor of the defrauded party until that party learns of the fraudulent conduct of the opposing party, provided the defrauded party could not have discovered it at an earlier date by the exercise of reasonable diligence.

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10. As the Court will note, these attempts to mislead the Plaintiffs by concealing Ohio Casualty's participation in the settlement negotiations continued until at least October. 1999. Ohio Casualty's counsel repeated these assertions to the Nelson Circuit Judge, Hon. Larry Raikes, in open court at a hearing conducted on February 1, 2000.

11. Judge Coffman evidently believed that, to trigger running of the statute, it was only necessary that the Plaintiffs discover **that they had been injured**. "Because the plaintiffs **discovered their injury** by April 1997 at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. (Order at 29). The Sixth Circuit, however, has stated that the "limitations period begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the **facts underlying the alleged fraud**. 336 F.3d at 501.

. . . . . .

> **Active concealment** frequently increases the difficulty of discovery, thereby justifying the aggrieved party's failure to learn of the fraud at an earlier date. The standard for discovery also is mitigated by the defendant's greater knowledge of the transaction or greater access to information or **by a fiduciary relationship between the parties.**[12]

CORMAN, *supra*, § 11.5.1 at nn. 13, 16-18.

This discovery rule has been specifically applied to RICO actions. *Coal-Mac, Inc. v. JRM Coal Co., Inc.*, 743 F. Supp. 499, 501 (E.D. Ky. 1990)(to trigger running of statute, plaintiff must "discover facts sufficient to make him aware that is was a RICO injury.")

Judge Coffman erroneously held that the Plaintiffs' cause of action accrued when they discovered that they had been injured. Such, however, is not the law. A cause of action only accrues when the plaintiff has discovered sufficient facts underlying the injury to enable him to state a cause of action. The Plaintiffs' cause of action did not accrue until they were able to verify the authenticity of the documents which Ohio Casualty had provided in discovery. As shown above this did not occur until Ohio's designated representative, Thomas Caldwell, and his predecessor, William Thomas Jones, gave their depositions on April 17, 2002.

Since the instant action was filed on November 13, 2002, less than one year after the Plaintiffs' cause of action accrued, the instant Complaint was timely filed.

Plaintiffs raised this point in their appeal to the Sixth Circuit. In its opinion, however, the court below stated:

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12. King stood in a fiduciary relationship to Pulliam by virtue of the fact that he had, at the time in question, been Pulliam's C.P.A., Pulliam's wife's C.P.A. the bank's C.P.A. and C.P.A. for Chaplin Insurance Agency, Inc.; Ohio Casualty stood in fiduciary relationship to Pulliam since he was their intended indemnitor; and Prudential stood in fiduciary relationship to Pulliam because he was one of the personal investors who had been defrauded by Prudential's agents. So stated both investigators of Prudential, James Waddell and Bruce Wright. This tends to show conspiracy and fraud. Jefferson Circuit Court sealed some evidence in the underlying action. This is the reason that Judge Coffman found Plaintiffs had stated a claim for violation of the Unfair Claims Settlement Practices Act in her Order of September 25, 2003.

> As this court has held, "the running of the statute of limitations begins when a plaintiff is put on inquiry notice - that is, when the plaintiff has been presented with evidence suggesting the possibility of fraud." *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 399 (6th Cir. 1999). A plaintiff need only be aware of "storm warnings" but does not need to "hear[] thunder and see[] lightning."

(Opinion, at 5).

Assuming, *arguendo*, that Judge Gibbons has correctly read *Isaak v. Trumbull*, there is an obvious conflict between that holding and the court's subsequent holding in *New England Health Care*. This Court's holding in *New England Health Care* makes it clear that "evidence suggesting the possibility of fraud," 169 F.3d 399, does not suffice to trigger the running of limitations. As noted above: "**There must be more than mere suspicion.**" CALVIN W. CORMAN, LIMITATION OF ACTIONS § 11.51 at n. 10 (1991), *citing*, *L.C.L. Theatres v. Columbia Pictures Indus.*, 566 F.2d 494, 497 (5th Cir. 1978).

The Sixth Circuit's opinion in the instant case obviously creates a conflict between the instant holding and its prior holding in *New England Health Care*, and also produces a conflict between the Sixth Circuit and the Fifth Circuit's holding in *L.C.L. Theaters*. This Court should accept certiorari in order to resolve this split in the circuits, and between the Sixth Circuit's own holdings.

**2. The panel was improperly constituted.**

At oral argument, after the Appellants' counsel had concluded her presentation, and as Appellees' counsel was beginning her presentation, Hon. Gordon Quist, United States District Judge for the Western District of Michigan, sitting by appointment, advised the parties and counsel that he owned stock in Bank of America, but had not realized that the Bank of America had acquired Barnett Bank of Tampa, N.A., one of the Defendants/Appellees. The Court's opinion then noted, in a footnote:

> The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, was present for oral argument, but

> subsequently recused himself from this case. He took no part in the court's consideration of decision of the case.

Order, at 1.

It was not until the parties received the court's written opinion that they learned Judge Quist had recused himself from the case.

28 U.S.C. § 46 (b) provides, in pertinent part:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified.

A subsequent section of that chapter, 28 U.S.C. § 46 (d) provides:

> A majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum.

As used in § 46 (d), "Quorum means such a number of the members of the court as may legally transact judicial business." *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953). Moreover, it is well settled that a quorum of the panel may proceed to judgment when one member of the panel dies or is disqualified. *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 927 (2d Cir. 1957)(L. Hand, J.)

Such has been the law from the beginning of the circuit courts of appeal; *see*, Act of Mar. 3, 1911, ch. 6, § 117, 36 Stat 1131 ("There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum"); Ch. 517, § 2, 26 Stat. 826 ("There is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum").

Shortly after the creation of the circuit courts of appeal, this Court was called upon to construe the meaning of the foregoing statutory language. In *Moran v. Dillingham*, 174 U.S. 153 (1899), this Court addressed a case in which a judge on the court of appeals was statutorily disqualified because of his

participation in the lower court proceedings. The Court held that the appellate decree in which he took part, even if not absolutely void, had to be set aside and quashed without regard to its merits, and the case had to be remanded to the court of appeals for a hearing and determination according to law by a bench of competent judges.

Fourteen years later, this Court faced a similar problem in *William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine T. Co.*, 228 U.S. 645 (1913). The Court reversed and remanded the case to the court below, so that the case could be heard by a competent court conformably to statutory requirements. The Court noted that it was required to remand the case so that the court of appeals could properly discharge the duty cast upon it by law, since the court below had committed reversible error. This error, it stated, resulted from the fact that the court of appeals which passed upon the case was virtually no court at all, because it had not been organized in conformity to law.

Even earlier, in *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (1893), this Court noted that if the statutory disqualification prohibited a judge from sitting on the court of appeals in a particular case, the resulting appellate decision was unlawful and should be set aside.

To the same effect are *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960); *United States v. Emholt*, 105 U.S. 414 (1881); *Nelson v. Carland*, 11 L. Ed. 126 (1843); and *United States v. Lancaster*, 5 L. Ed. 127 (1820). In all of these cases, this court noted that it was authorized to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal.

Only three years ago, this Court was confronted with a similar case. *Nguyen v. United States*, 539 U.S. 69 (2003). That case arose when a panel of the Ninth Circuit erroneously included a judge whom the Court determined was an Article I judge rather than an Article III judge. 539 U.S. at 74-76. The Court then stated that its decision was "driven . . . by a concern . . . for the validity of the composition of the Court of Appeals." 539 U.S. at 81.

The Court then stated:

> [T]he statutory authority for courts of appeals to sit in panels requires the inclusion of at least three judges in the first instance. . . It is clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is

> assigned becomes unable to participate, but it is less clear whether the quorum statute offers postjudgment absolution for the participation of a judge who was not otherwise competent to be part of the panel . . . Thus, although the two Article III judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel. In the light of that doubt, it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized conformably to the requirements of the statute.

*Nguyen v. United States*, 539 U.S. at 82-83 (citations and internal quotations omitted).

Since the rendition of this opinion by this Court, there have been no reported decisions by the lower courts construing and explaining the meaning of the foregoing language. As Appellants understand the holding of *Nguyen,* 28 U.S.C. § (d) protects the integrity of a decision rendered by two judges of a three-judge panel, when the panel as originally constituted was legally qualified. However, if one of the three judges was not legally qualified to serve at the time he was appointed to the case, any decision rendered by the two remaining judges is *coram non judice,* since the panel as originally constituted had not been organized according to law.

Applying this rule to the facts of the case at bar, it is clear that the decision rendered by the panel cannot stand. Although the court's written opinion does not state the reason for Judge Quist's recusal, reference to the tape of the proceedings will show that this recusal was, in fact, due to a perceived conflict of interest, since he was a stockholder in one of the defendant corporations. Although Judge Quist, and the parties, may not have become aware of this fact until midway through the oral argument, the disqualification obviously existed at the time he was appointed to hear the case.

The court stated that Judge Quist "took no part in the court's consideration or decision of the case." (Order, at 1). With all due respect, Petitioners submit that, while Judge Quist may well have refrained from participating in the post-argument analysis, it was not until after Appellants' counsel had presented her

argument-in-chief, and Appellees' counsel was beginning her presentation, that Judge Quist advised the parties and their counsel of apparent conflict of interest; and they were not advised of the fact he had recused himself until they received the court's written opinion. Is it contended that Judge Quist "took no part" simply because he did not happen to ask a question of Appellants' Counsel during the presentation of her case in chief?

Appellants submit that, under the doctrine announced in *Nguyen,* this case was inadvertently assigned to an improperly constituted panel, which in the words of *William Cramp & Sons*, constituted "virtually no court at all." Appellants reiterate, it would be quite another matter if Judge Quist had been properly qualified at the time he was appointed to the panel, and thereafter become disqualified; in such case, 28 U.S.C. § 46 (d) would "absolve" the quorum of any error. The conflict of interest, however, admittedly existed at the time the panel was appointed, even though Judge Quist and the parties may not have been aware of it until during the oral arguments. The decision of the panel is void *ab initio,* and must be vacated.

The case authority cited by the court below in its amended order is not to the contrary. Petitioners believe that each of these cases, properly construed, involved a case in which the third judge of the panel was properly qualified at the time the panel was appointed, but became disqualified thereafter. In the instant case, however, Judge Quist's conflict of interest obviously existed at the time the panel was appointed, even though he may not have been aware of it at that time.

The instant case, therefore, is analogous to those cases in which one member of the panel did not meet the statutory qualifications at the time the panel was appointed, rather than to the cases cited by the court below. Such being the case, the panel which heard the instant appeal was, in the words of this Court, "no court at all," and its holding was and is void *ab initio.*

**3. Plaintiffs have pled a claim for RICO.**

Judge Coffman also held that the Plaintiffs had failed to state a claim for violation of the RICO statute. She stated that the RICO counts were deficient in several respects. First of all, Judge Coffman noted, correctly, that Plaintiffs had failed to indicate under which subsection of 18 U.S.C. § 1962 they were proceeding. Plaintiffs respond that their complaint states a claim for violation of all three applicable sections of the RICO statute, *i.e.*, 18 U.S.C. § 1962 (a), 18 U.S.C. § 1962(b), and 18 U.S.C. § 1962(c). If Judge

Coffman had believed it essential that each subsection be explicitly identified, Plaintiffs should have been granted leave to amend their Complaint in this regard.

Second, Judge Coffman also stated that:

> The person accused of the violation and the enterprise must be separate and distinct entities . . . In order to state a claim under RICO, the plaintiff must allege that a defendant participates in the conduct of affairs of an enterprise that is separate froim the defendant itself. A corporation does not violate RICO by participating in the conduct of its own affairs.

Order, at 10, 12.

Judge Coffman was only partially correct. While the rule set out in her Opinion is applicable to RICO claims predicated upon subsection (c) of § 1962, cases grounded on subsections (a) and (b) of § 1962 do not require a stringent separation of the guilty person and the enterprise. PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL § 5.11 at n. 53 (2d ed. 1997); *see, Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990)("Unlike subsection (c), which requires the relationship between the 'person' and the 'enterprise' (i.e., employer-employee), subsection (a) requires only the use of an 'enterprise' by a 'person.' . . . [T]he offender and the enterprise need not be separate."); *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664 (2d Cir. 1989)("under § 1962(a), it may be possible for a defendant to be the enterprise").

In *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404 (5th Cir. 1990), the court stated that:

> In contrast to the language of subsection (c) which 'requires a relationship between the "person" and the "enterprise," ' subsection . . . (b) require[s] only the *use* of an "enterprise" by a "person." Thus the RICO person and the enterprise need not be distinct for a person to be held liable under subsection (b).

*Landry v. Air Line Pilots Ass'n*, 901 F.2d at 425 (emphasis by court).

Moreover, in *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), the Ninth Circuit held that the "person" may also be the "enterprise" under either section 1962(a) or (b) if it is also "the direct or indirect beneficiary of the pattern of racketeering activity." 806 F.2d at 1398. Since Plaintiffs have stated a claim under all three sections of the RICO Act, they were not required to allege an "enterprise" separate from the "person," in pleading violations of subsections (a) and (b) of 18 U.S.C. § 1962.

Third, Judge Coffman stated that the Plaintiffs had not asserted that the "enterprise" had a sufficient structure to satisfy the definition found in 18 U.S.C. § 1961(4):

> If the enterprise is not a legally recognized entity, then the plaintiffs must allege an association-in-fact. "To satisfy the enterprise requirement, an association-in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the patten of racketeering activity in which it engages. Some sort of organizational structure or chain of command is required; this takes simple conspiracies out of the scope of RICO.

Order, at 10 (citations omitted)

Respectfully, Plaintiffs insist that Judge Coffman is mistaken, and that she misread the RICO statute on this point. As noted above, these requirements apply only to subsection (c) of 18 U.S.C. § 1962; they have no applicability to complaints based upon the violation of subsections (a) and (b). Moreover, Plaintiffs have alleged that each of the various corporations, namely, Peoples State Bank, Nelson Bancorp, Inc., Prudential Insurance Company of America, Prudential-Bache Securities, Inc., Barnett Bank of Tampa, N.A., First Union Bank, and the U.S. Mortgage & Trust Co.,Inc., is an "enterprise." These banks and corporations obviously are "legally recognized entities" and, therefore, satisfy the foregoing requirements.

As to the allegation that the various associations-in-fact have violated subsection (c) of the RICO Act, Plaintiffs submit that the requirement is not so rigid as Judge Coffman asserts. This Court explained this point in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Wrote the Court:

A violation of § 1962(c), the section on which

> Sedima relies, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not a violation of § 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and to the extent that, he has been injured in his business or property by the conduct constituting the violation.
>
> But the statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

*Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 496 - 97.

Since "the statute requires no more than this," it is obvious that simple and literal compliance with this relatively straightforward charter for the pleading of a civil racketeering claim is sufficient to state a complaint that will survive a dismissal motion. As *Sedima* teaches, in order to state a claim, the pleader must allege an "enterprise." Section 1961(4) provides that the term " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." This language is expansive; the word "includes" renders the statutory listing illustrative, not exhaustive. *U.S. v. Hiber*, 603 F.2d 327 (2d Cir. 1979)("The definition of 'enterprise' is a list beginning with the word 'includes.' This indicates that the list is not exhaustive but merely illustrative"). The term is liberally interpreted. *U.S. v. Masters*, 924 F.2d 1362 (7th Cir. 1991)( "The statute says 'enterprise includes' not 'enterprise means.' The point of the definition is to make it clear that it need not be a formal enterprise.").

Judge Coffman also stated that the Plaintiffs were required to plead their fraud allegations with specificity pursuant to the requirements of Rule 9(b), F.R.C.P. "Rule 9(b) of the Federal Rules of Civil Procedure requires fraud claims to be pled with particularity. This pleading requirement applies to fraud claims under RICO." Order, at 13. She notes, however, that: "Rule 9(b) does not apply to the Hobbs Act claims." *id.*

As shown above, the Plaintiffs have alleged that Defendants violated the RICO Act by committing extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. They clearly were not required to plead these claims with the specificity required by Rule 9(b), F.R.C.P. "Where fraud lies at the core of the action, Rule 9(b) applies." *Hayduk v. Lanna,* 775 F.2d 441, 443(1st Cir. 1985). However, conspiracy claims not based upon fraud "are governed by the more liberal pleading requirements of Federal Rule of Civil Procedure 8 rather than Rule 9(b)." *Id.* Plaintiffs readily concede that RICO violations based on fraud must be pleaded with the same particularity that is required in pleading fraud. They insist, however, that this rule does not apply to RICO complaints based on the predicate offense of extortion, such as the case at bar.

A court "will not scrutinize non-fraud RICO allegations of the Complaint against a heightened particularity standard." *U.S. v. Bonnano Organized Crime Family,* 683 F. Supp. 1411, 1428 (E.D. N.Y. 1988). As one federal court has explained:

> [T]he exceptional mandate of Federal Rule of Civil Procedure 9(b) that allegations of fraud and mistake be pleaded with particularity is inapplicable to RICO actions that do not involve claims of fraud.

*U.S. v. Private Sanitation Industry Assn.,* 793 F. Supp. 1114, 1124 (E.D. N.Y. 1992).

A RICO claim which is based on extortion as the predicate act, does not fall under the coverage of Rule 9(b), F.R.C.P.

> Pavlovic and Franey also challenge the allegations against them as inadequate for pleading fraud with particularity under the requirements of Fed.R.Civ.P. 9(b). However, this challenge is misplaced since the predicate acts alleged, while sounding in fraud, are based on federal and state statutes with specific proscriptions against

> extortionate and other illegal conduct, not on the mail or wire fraud statutes which normally invoke the pleading requirements of Rule 9(b) in the context or RICO.

*National Elec. Benefit Fund v. Heary Bros.*, 931 F. Supp. 169, 191 (W.D. N.Y. 1995).

Since allegations of extortion do not trigger the provisions of Rule 9(b), the Plaintiffs were not required to plead their Complaint for extortion with particularity.[13] The Court, therefore, should reinstate the Plaintiffs' RICO counts.

**4. Defendants Horn and U.S. Mortgage & Trust were properly served.**

A matter which was left unresolved by the trial court is the question of whether Defendants J.R. Horn a/k/a Marion A. Horn, Jr. and the United States Mortgage and Trust Company, Inc., were adequately served with process. This mater was raised by the Plaintiffs in their Motion to Remand. However, the court did not find it necessary to decide the question at that time, and she subsequently failed to revisit the matter. Consequently, it is unclear whether Defendants J.R. Horn and U.S. Mortgage and Trust Company, Inc., were before the appellate court.

Plaintiffs submit that these two parties Defendant were adequately served with process. Service of process was made upon J.R. Horn on November 16th, 2002, by certified mail. The summons and complaint were sent restricted delivery, as required by CR 4.01(1)(a). Procedss was accepted by "Elaine Horn, POA." This service clearly complied with the requirements of CR 4.04(2), which provides:

> (2) Service shall be made upon an individual within this Commonwealth, other than an unmarried infant or person of unsound mind, by delivering a copy of the summons and of the complaint (or other initiating document) to him personally or, if acceptance is refused by offering personal delivery to such person, or by delivering a copy of the summons and of the complaint (or

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13. Moreover, if she believed that the Complaint lacked the requisite particularity, Judge Coffman should have permitted the Plaintiffs to amend their Complaint and cure the defect, rather than dismissing it outright.

> other initiating document) **to an agent authorized by appointment** or by law to receive service of process for such individual.

Since Elaine Horn was power of attorney for J.R. Horn, she obviously was "an agent authorized by appointment . . . to receive service of process for such individual." *U.S. v. Balanovski,* 236 F.2d 298 (2d Cir. 1956)(one acting under poser of attorney may accept service of process); *New England Reinsurance Corp. v. Tennessee Insurance Co.,* 780 F. Supp. 73, 78 (D. Mass. 1991); *U.S. v. Davis,* 38 F.R.D. 424 (N.D. N.Y. 1965). Therefore, service was properly effected upon Defendant J.R. Horn.

Service of process was also made upon Defendant U.S. Mortgage and Trust Co., Inc. on or about November 17, 2002, via certified mail. The summons and complaint were sent restricted delivery as required by CR 4.01(1)(a). Process was accepted by "Elaine Horn, POA." This service clearly complied with the requirements of CR 4.04(5), which provides:

> (5) Service shall be made upon a corporation by serving **an officer** or managing agent thereof, or the chief agent in the county wherein the action is brought, or any other agent authorized by appointment or by law to receive service on its behalf.

Ms. Horn is the Vice President of U.S. Mortgage & Trust Co., Inc. Thus, she clearly was "an officer" of the corporation and, as such, was authorized to accept service of process on its behalf. *Pioneer Utilities Corp. v. Scott-Newcomb, Inc.,* 26 F. Supp. 616, 618 (E.D. N.Y. 1939)(service on vice-president of corporation is service on "an officer of the corporation"); *see, In re. Grieb Printing Co.,* 230 B.R. 539, 541 (Bkrtcy. W.D. Ky. 1999)(signature of corporate officer binds corporation).

As the Sixth Circuit held in *Tech Hills II v. Phoenix Home Life Mutual Ins. Co.,* 5 F.3d 963 (6th Cir. 1993): "A complaint is considered received by a corporation when it is received by an agent authorized to accept service of process." 5 F.3d at 968.

## CONCLUSION

As shown above, the judgment of the United States Court of Appeals by which it dismissed the appeal of the Petitioners was contrary to law and must be reversed. The Court, therefore, should

grant Certiorari to the United States Court of Appeals for the Sixth Circuit and, upon hearing, should remand the action with directions that the Petitioners' cause of action be reinstated. Petitioners pray for an Order of the Court so holding.

Respectfully submitted,

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*Counsel for Petitioners*

**18 U.S.C. § 1951**

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section——

(1) The term ""robbery"" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term ""extortion"" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term ""commerce"" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 10–115, 151—166 of Title 29 or sections 151—188 of Title 45.

§§ 1961. Definitions

As used in this chapter——

(1) ""racketeering activity"" means

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891—894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461—1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section

1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581—1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phone records, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421—24 (relating to white slave traffic),

(C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a

controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States,

(E) any act which is indictable under the Currency and Foreign Transactions Reporting Act,

(F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or

(G) any act that is indictable under any provision listed in section 2332b (g)(5)(B);

(2) ""State"" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) ""person"" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) ""enterprise"" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) ""pattern of racketeering activity"" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) ""unlawful debt"" means a debt

(A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political

subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and

(B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) ""racketeering investigator"" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) ""racketeering investigation"" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) ""documentary material"" includes any book, paper, document, record, recording, or other material; and

(10) ""Attorney General"" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**LOUISVILLE DIVISION**

**CIVIL ACTION NO. 02-747-C**

**PAUL A. SIMS, ET AL.,** **PLAINTIFFS**

**V.** **ORDER**

**OHIO CASUALTY INSURANCE COMPANY, ET AL.** **DEFENDANTS**

* * * * * * * * * * *

## I. Introduction

This matter is before the court on the motions to dismiss or in the alternative for summary judgment of defendants James O. King, Jr. ("King"); Peoples State Bank, Chaplin, Kentucky ("Peoples"); and Nelson Bancorp, Inc., (Docket No. 1); defendants Prudential Insurance Co. of America and Prudential-Bache Securities, Inc. ("the Prudential defendants")(Docket No. 3); defendant Barnett Bank of Tampa ("Barnett")(Docket No. 12): defendant First Union Bank ("First Union")(Docket No. 19); and defendant Ohio Casualty Insurance Co. ("Ohio Casualty")(Docket No. 69) and on the plaintiffs' motion to continue (Docket No. 4).

The plaintiffs in this case are Paul Sims ("Sims"); Warren Pulliam ("Pulliam"); Janice Pulliam; W & J Pulliam, Inc.; Chaplin Insurance Agency, Inc.; and Kerry Pulliam (collectively "the plaintiffs"). The defendants in this case are Ohio Casualty; Nelson Bancorp, Inc.; Peoples; King; Barnett; the Prudential defendants; U.S. Mortgage & Trust Company, Inc. ("U.S. Mortgage"); and J.R. Horn ("Horn"); and First Union (collectively "the defendants").

The plaintiffs seek recovery against all the defendants for RICO violations (Count IV0, RICO Conspiracy (Count V), indemnity and contribution (Count iii), theft by deception

(Count VI), engaging in organized crime (Count VII), fraud (Count VIII), intentional infliction of emotional distress (Count IX), outrageous conduct (Count X), and punitive damages (Count XIV). The plaintiffs seek a recovery from Ohio Casualty under the Unfair Claims Settlement Practices Act (Count I). Pulliam seeks damages from King for breach of fiduciary duty (Count XI) and a declaratory judgment concerning the February 25, 1988 contract between Pulliam and King(Count XIII). Pulliam also seeks a recovery from Peoples for an amount Peoples allegedly failed to pay him in 1986 (Count XII).

II. Statement of the Case

From December 1985 to December 1986, Donald Tibbitts ("Tibbitts") and Benham Mirzaian, Agents of Prudential. engaged in schemes to defraud Prudential, its customers, and other financial institutions ("the Tibbitts scheme")(¶ 122k-n, p-ee)[14] As part of the scheme, Tibbitts allegedly used his position at Prudential to obtain a substantial investment from the Peoples board and to procure loans from Barnett using fraudulent letters of credit; Tibbitts also allegedly gave bad checks to Peoples, created substantial overdrafts at Peoples, and wired money from Barnett to Peoples to cover the overdrafts. *Id.* Pulliam was president of Peoples at the time of the Tibitts scheme. In 1990, Pulliam was convicted of one count of bank fraud and three counts of aiding and abetting for his participation (certifying checks) in the Tibbitts scheme. (Criminal Judgment, Exhibit to Motion to Dismiss of Defendants Peoples, King and Nelson Bancorp 1C).[15]

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1. A paragraph number without more indicates that the allegations come from the plaintiffs' 2002 complaint.

[15]"A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice. *New England Health Care Employees Pension Fund v. Ernst & Young LLP,* 336 F.3d 495, 501-02 (6th Cir.

**A. The Restitution Agreements between Peoples and Pulliam**

On December 17, 1986 (after the Tibbitts scheme was uncovered), King, a director of Peoples, allegedly induced Pulliam to sign a restitution agreement guaranteeing that Pulliam would indemnify Peoples for any losses arising from Pulliam's actions in connection with the scheme. King also allegedly induced Pulliam to sign a separate option agreement giving King the option to buy all of Pulliam's stock at below market value, to tender his stock certificates to Peoples, and to resign as president of Peoples. Pulliam claims that the agreements are void because of lack of consideration, misrepresentations by King, duress, and King's breach of fiduciary duty. (¶¶ 38t-v, 169a-i, 170-73, 184-87).[16]

On December 18, 1987, Pulliam filed an action against Peoples and King in Nelson Circuit Court, 87-CI-395, seeking rescission of these December 17, 1986, agreements based on lack of consideration, fraud, and duress (Exh. 1E). This action culminated in a settlement agreement on February 25, 1988, in which Pulliam admitted to causing overdrafts on accounts at Peoples; agreed to remain liable to Peoples for losses, specifically including any claims by Barnett, arising from Pulliam's conduct in connection with the Tibbitts scheme; and agreed to release King and Peoples from all claims "relating to in any way the claims which are of could have been the subject of the suit and any claims Pulliam now has against the Bank and James O. King, Jr."

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2003)(allowing the use of a complaint from a prior fraud case to prove that plaiintiff had actual or constructive knowledge of the facts underlying the claim as of the date of the prior complaint).

[16]This is the first time that Pulliam has expressly claimed a fiduciary breach by King; however, the q987 complaint and the 1993 motion to set aside judgment make it clear that Pulliam was aware of the alleged fiduciary breach long ago. The other claims are alleged in ¶ 26t-v of a substantially similar complaint filed by the same plaintiffs in the Middle District of Florida in 1997 ("Tampa complaint )(Exhibit to Motion to Dismiss of Defendant Ohio Casualty 69 K) and the 1987 Complaint (Exh. 1E).

(Exh. 1F). The court accepted the settlement agreement and dismissed the action with prejudice on February 25, 1988 (Exh. 1H).

Pulliam claims that the settlement agreement is invalid because King, in collusion with Ohio Casualty, coerced him to sign it (¶¶ 92, 169j). Pulliam argued the same grounds in his 1993 motion in state court to set aside the Nelson Circuit Court judgment under C.R. 60.02; Pulliam claimed that King and Peoples had fraudulently induced him to sign the settlement agreement by concealing the pending claim of Ohio Casualty (Exh. 1J; see Trial Court's findings, Exh. 1D). The court denied the motion in December 1993, finding that Pulliam had not been misled and noting that three years was an unreasonable delay in filing the motion (Exh. 1D). The plaintiffs have made no relevant new allegations, beyond those made to the Nelson Circuit Court, concerning the validity of the Peoples-Pulliam settlement agreement.

**B. The Barnett Settlement**

On February 1, 1988, Barnett filed a suit against Peoples in Jefferson Circuit Court, 99-CI-00812, seeking reimbursement for sums it had wrongfully paid to Peoples as a result of Pulliam's role in the Tibbitts scheme (¶ 109). Barnett asserted in paragraph 28 of its complaint against Peoples that Prudential-Bache refused to make good on letters of credit, resulting in a $562,000 loss to Barnett (¶ 122; Exh. 1F). In 1989. Barnett disclosed documents to Peoples (and Ohio Casualty) indicating that Barnett had actually entered into a 1987 settlement with Prudential under which Barnett received $282,500 in reimbursement (¶ 99). As part of the settlement, Prudential had agreed not to "treat any other lending institution more favorably that . . . Barnett" (¶ 122ff). Despite its knowledge of the Prudential agreement, Peoples settled with Barnett on October 12, 1989 (¶ 100). Pulliam never intervened in the action.

The plaintiffs allege that Peoples and Ohio Casualty breached their duty to Pulliam by failing to defend *Barnett v. Peoples,* failing to tender him the defense,

expressly refusing to disclose settlement terms to Pulliam and get his consent, and failing to disclose the Prudential settlement to him (¶¶ 38a, h. i-n, ee, 88-90, 101, 118-120). The plaintiffs allege that Barnett knowingly misrepresented to the court that it had not received a $282,500 reimbursement from Prudential (¶¶ 38r, 99. 122i-j), that Ohio Casualty and Peoples knew or should have known of the reimbursement and that Barnett was attempting to get a double recovery (¶¶ 38w, 99), and that the Prudential settlement provided an absolute defense in the Barnett action (W
101).[17] The plaintiffs claim that Barnett and Peoples failed to implead Pulliam even though he was an indispensable party (¶¶ 86-87); that First Union's wrongful refusal to honor a check was the cause of Barnett's injuries (¶ 122f); that Barnett failed to assert claims against First Union and Barnett's insurer, Aetna (¶ 122g, h); that the Prudential agents were the culpable parties (¶ 122 k-n, p-ee); and that Prudential agreed to give favorable treatment to Barnett (¶ 122ff). The plaintiffs claim generally that the defendants are all involved in a conspiracy to defraud the plaintiffs by concealing the available defenses to the 1988 Barnett claim.

Ohio Casualty paid the settlement on behalf of Peoples (Order denying motion to set aside 1992 judgment, 69E). On September 27, 1989, Peoples assigned to Ohio Casualty its right to indemnification from Pulliam. *Id.* On May 25, 1990, Ohio Casualty filed suit against Pulliam in the western District of Kentucky, C-90-0367-L-A, seeking indemnification for the $225,000.82 it allegedly paid Barnett under the settlement (¶ 34). In July, 1992, the jury returned a verdict for Ohio Casualty in the amount of $200,000 (¶ 36). The plaintiffs allege that this judgment was improper because of the defects in the Barnett settlement; that Peoples could not validly assign the indemnity contract (¶ 38c, d); that Ohio

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4. In paragraph 26w of the Tammpa complaint, the plaintiffs likewise claimed that "Ohio Casualty knew, or should have known, that Barnett Bank had entered into a settlement agreement with Prudential and thae Peoples had alleged in the underlying action that Barnett Bank had already received restitution from Prudential and was attempting to secure a 'couble recovery from Peoples Bank' „ (Exh. 69K).

Casualty and Peoples failed to demand apportionment of liability in the Barnett suit (¶ 38p); that Ohio Casualty failed to seek judgments against Prudential and others (¶¶ 38aa-cc, 122o);[18] that Ohio Casualty failed to execute against collateral held by Peoples (¶ 139); that Ohio Casualty was in complete control of the defense to the Barnett action (¶¶ 106, 111, 113); and that Ohio Casualty failed to conduct an adequate investigation before settling the Barnett action (¶ 139).

In October 1995, Pulliam filed a motion to set aside this 1992 verdict, alleging that Ohio Casualty had failed to tender to Pulliam the defense of the Barnett action; that the indemnity contract was not assignable; that Jefferson County was an improper venue for *Barnett v. Peoples;* and that the agreed settlement resulted from fraud and collusion. (Pulliam's Memorandum in Support of the Motion to Set Aside, Exh. 69D, at 151-52). The Jefferson Circuit Court denied all of these claims (Order Denying Motion to Set Aside 1992 Judgment, 69E, at 428-29).

On April 12, 1993, Ohio Casualty filed an enforcement action in the Nelson Circuit Court, Action 93-CI-00130, seeking to set aside allegedly fraudulent conveyances made by Pulliam (¶ 50). This action is still pending (¶ 51). In addition to this action, from February 8 to December 10, 1993, Ohio Casualty levied against the income and property of Pulliam, including the joint bank account of Pulliam and Janice Pulliam; filed lis pendens against property bought by Sims and Kerry Pulliam from W & J Pulliam, Inc.[19]; seized W & J Pulliam, Inc. stock representing 37.5% of the stock of Chaplin Insurance Agency[20]; and caused other related harms (¶¶ 39-83). The plaintiffs claim financial harm,

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5. The plaintiffs made the same allegations of failure to seek apportionment and failure to recover from other paties in paragraphs 26p and aa-cc of the Tampa complaint.

6.W & J Pulliam, Inc., appears to be owned and operated by Pulliam and Janice Pulliam.

7. Chaplin Insurance Agency is also known as Whitehouse & Pulliam Insurance Agency and is owned in part by Pulliam (¶ 29).

mental anguish, and emotional distress as a result of the pending legal actions (¶ 84).

In April 1997, the plaintiffs filed a complaint in the Middle District of Florida, 97-846-CV-T-17-A, against Ohio Casualty, Barnett, and Prudential alleging substantially the same facts as the complaint before this court (Exh. 69K).

In 2002, the plaintiffs filed a motion to file an amended answer and counterclaim in the Nelson Circuit Court action, 93-CI-00130 (Exh. 1K). The allegations in the proposed amended answer are the same as the allegations made in the current complaint, See *id.* the plaintiffs stated that the facts underlying the counterclaims were unknown to them until after document production on July 14, 2000, and subsequent depositions clarifying the meaning of the documents. *Id.* The plaintiffs further stated that the facts could not have been discovered earlier through due diligence because Ohio Casualty deliberately concealed them. *Id.* After the state court denied the motion (Exh. 1L0, the plaintiffs filed the current action.

**C. Claims Not Related to the Central Facts.**

Under Count II, the plaintiffs allege that Ohio Casualty attached an IRA and a life insurance policy in violation of state law in 1993 (¶¶ 134-136). Under Count XII, the plaintiffs allege that the directors of Peoples voted to pay each director $1,200 for services on or about December 1, 1986; Pulliam was a director at the time but was never paid (¶¶ 191-193).

**III. Federal Claims**

**A. RICO (Count IV)**

**1. Elements**

The plaintiffs have alleged violations of an unspecified subsection of 18 U.S.C. § 1962. To prove a violation of RICO under 18 U.S.C. § 1962(a), the plaintiffs must show injury caused by the use of income derived from a

pattern of racketeering *Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir. 1990). To prove a violation of § 1962(b), the plaintiffs must show that a defendant acquired or maintained an interest in an enterprise through racketeering. *ADVOCACY Organization for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 328-29 (6th Cir. 1999). The plaintiffs have alleged neither injury from use of the income nor acquisition of an interest through racketeering by any defendant, so the court focuses its discussion on § 1962(c).[21]

Section 1962(c) requires that 1) a person 2) associated with an enterprise engaged in interstate commerce 3) participate in the conduct of the affairs of the enterprise 4) through a pattern of racketeering.

The person accused of the violation and the enterprise must be separate and distinct entities. *Cedric Kusher Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001). Under 18 U.S.C. § 1961(4), "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." If the enterprise is not a legally recognized entity, then the plaintiffs must allege an association-in-fact. "To satisfy the enterprise requirement, an association in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages." *Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir. 1993)(citing *United States v. Turkette*, 452 U.S. 576, 583 )1981). Some sort of organizational structure or chain of command is required; this takes simple conspiracies out of the scope of RICO. *VanDerBroeck v. Common Point Mortgage Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000).

In order to participate in the conduct of the affairs of the enterprise, a person must participate in the "operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993).

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8. To the extent that King acquired an interest in an enterprise through his 1986 option to purchase stock of Nelson, any alleged injury from this purchase became complete in 1988 then King exercised the optioin. Pulliam was aware of the alleged fraud and coercion surrounding the 1986 agreement in 1987 when he filed his complaint against Peoples and King. An claim based on this injury is barred by the four-year statute of limitations on RICO claims in *Agency Holding Corp v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987), as discussed in section IV (Statute of Limitations).

Under 18 U.S.C. § 1961(5), a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." The plaintiffs allege as predicate acts satisfying this requirement the following crimes listed in 18 U.S.C. § 1961(1): bank fraud,[22] wire fraud,[23] and extortion under the Hobbs Act.[24]

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9. 18 U.S.C. § 1344, Bank Fraud, states:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice–(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; . . . „

10. 18 U.S.C. § 1343, Fraud by wire, radio, or television, states:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . . . „

[24]18 U.S.C. § 1951, Interference with commerce by threats or violence, states:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person pr property in furtherance of a plan or purpose to do anything in violation of this section . . .

. . .

(2) The term 'extortion' means the obtaining of preperty from

**2. Sufficiency of pleadings**

*a. Enterprise and conduct of affairs*

With the exception of Ohio Casualty and King, the plaintiffs have failed to allege an enterprise with which the defendants are associated. A plaintiff must plead precisely the enterprise alleged in a RICO claim. *See Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989). The plaintiffs allege generally that each of the corporate defendants is an enterprise. In order to state a claim under RICO, the plaintiff must allege that a defendant participates in the conduct of affairs of an enterprise that is separate from the defendant itself. A corporation does not violate RICO by participating in the conduct of its own affairs. The complaint fails to allege that any defendant other than Peoples is an enterprise whose affairs have been conducted by other persons. It is not a RICO violation for Peoples to conduct its own affairs. With regard to the other defendants, the plaintiffs have alleged that Ohio Casualty and King have been involved in the conduct of the affairs of Peoples – Ohio Casualty during the Barnett settlement negotiations only and King as an employee of Peoples. The plaintiffs have failed to allege such conduct by the other defendants.

The plaintiffs also have not alleged an association-in-fact among the defendants sufficient to create an enterprise. They have failed to allege any kind of organizational structure among the defendants independent of the alleged "pattern of racketeering." The "enterprise" and "participation in the conduct of affairs" elements have been sufficiently alleged only with regard to King and Ohio Casualty; for this reason, the RICO claims against the other defendants fail.

*B. Racketeering activities*

Rule 9(b) of the Federal Rules of Civil Procedure requires fraud claims to be pled with particularity. This pleading requirement applies to fraud claims under RICO. *See Blount Financial Services, Inc., v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987)(requiring a RICO complaint alleging mail fraud to "state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the

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another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. „

plaintiff's reliance on defendant's false statement of fact.") In *Rotella v. Wood*, the Supreme Court noted that Rule 11(b)(3) does give plaintiffs some latitude to make factual allegations that they believe can be proved after discovery; the Court, however, did not excuse the plaintiffs from the pleading requirements in Rule 9(b). 528 U.S. 549, 561 (2000). Rule 9(b) does not apply to the Hobbs Act claims, but the pleadings must still be sufficient to put the defendants on notice.

The plaintiffs have failed to allege two predicate acts by any of the defendants. The plaintiffs have alleged only one predicate act by King. the plaintiffs allege that King made fraudulent misrepresentations in 1986 concerning his intention to aid Pulliam and that Pulliam relied on the misrepresentation in entering into the q986 agreements (¶¶ 169-72). The plaintiffs have alleged no other misrepresentations by King. The plaintiffs do allege numerous times that King coerced Pulliam to sign the 1986 agreement (¶ 169a,g,h) and the 1988 settlement agreement (¶ 92)(alleging also that Ohio Casualty conspired to coerce Pulliam). In claiming coercion, the plaintiffs do not, however, allege any "wrongful use of actual or threatened force, violence, or fear" sufficient to state a claim for extortion under the Hobbs Act.[25] Because they allege only one predicate act, the plaintiffs have failed to state a claim for a RICO violation by King.

The plaintiffs have failed to plead with particularity fraud by any defendant other than King. In a civil RICO case based on mail fraud, the Sixth Circuit stated that a plaintiff "must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact." *Blount Financial Services*, 819 F2d at 152. The plaintiffs plead one misrepresentation by Barnett – the statement in paragraph 28 of the 1988 complaint that Prudential had refused to make good on letters of credit leading to a loss for Barnett (¶122i-j). The plaintiffs' complaint, however, indicates that there was no reliance on the misrepresentation (¶ 38w).("Peoples had alleged in the underlying complaint that Barnett had already received restitution from Prudential.") Even if the plaintiffs had alleged reliance on this misrepresentation, they would still have pled only one predicate act

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[25]In ¶ 92, the plaintiffs allege that Oio Casualty conspired with King to induce and coerce Pulliamto sign the q988 settlement agreement. An extortion claim against Ohio Casualty also fails for lack of an allegation of wrongful use of threatened force,.

by Barnett.

The plaintiffs have alleged one act of misrepresentation by a First Union agent in orally agreeing to honor a check that it later refused to honor (¶ 122f). The plaintiffs have not alleged any reliance by Barnett on that promise; because no reliance has been alleged, the plaintiffs have failed to allege fraud by First Union. The plaintiffs have also failed to allege th at First Union obtained any property of someone else through its predicate acts as required to state a claim under the wire and bank fraud statutes. The plaintiffs have not alleged any other predicate acts by First Union so they have failed to state a claim for a RICO violation.

The plaintiffs have alleged no misrepresentations by the Prudential defendants, only fraud by Prudential agents Tibbitts and Mirzaian. The plaintiffs have not alleged that the Prudential defendants should be liable for the actions of Tibbitts and Mirzaian; the plaintiffs have only nebulously alleged concealment of facts. Even if the plaintiffs had sufficiently alleged liability for the actions of the agents, the Prudential defendants would not be liable for RICO violations because the plaintiffs have failed to plead an enterprise separate from the corporate defendant. *See Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993)("an organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself.").

The plaintiffs have alleged no misrepresentations by Horn, U.S. Mortgage, Peoples, Nelson, or Ohio Casualty. Because the plaintiffs have failed to plead either two predicate acts or an enterprise for each defendant, the plaintiffs have failed to state a claim for a violation of RICO against any of the defendants.

**B. RICO Conspiracy (Count V)**

To prove a violation of § 1962(d),[26] a plaintiff must prove that the overt act in furtherance of the conspiracy is itself a RICO violation. *Beck v. Prupis*, 529 U.S. 494, 505-06 (2000). Where a plaintiff has failed to allege a violation of § 1962(a)-(c), a conspiracy claim under § 1962 also fails. *See Miller v. Norfolk Southern Ry. Co.*, 183 F.Supp.2d 996, 1003 (N.D. Ohio 2002)(citing cases from other circuits). Because the plaintiffs have

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[26]18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. „

failed to state a claim for a RICO violation by any of the defendants, they have failed to state a RICO conspiracy claim.

**IV. State Claims**
**A. Unfair Claims Settlement Practices Act (Count I)(Ohio Casualty)**

**1. General Description**

The Unfair Claims Settlement Practices Act[27] imposes duties on organizations in the business of insurance to act reasonably in investigating, defending, and steeling claims against insured individuals. A private right of action under the act is created through K.R.S. 446.070.[28] *State Farm Mut. Auto Ins. Co. v.*

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[27]K.R.S. 304.12-230, Unfair claims settlement practices, states:

"it is an unfair claims settlement practice for any person to comit or perform any of the following acts or omissions:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policits;

(3) failing to adopt and implement reasonable standards for the proompt investigation of claims arising under insurance policies; . . .

(6) Not attmepting in good faith to effectuate proompt, fair and equitable settlements of claims in which liability has become reasonably clear; . . .

[28]K.R.S. 446.070, Penalty no bar to civil recovery, states:

"A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation, „

*Reeder*, 763 S.W.2d 116, 118 (Ky. 1988), The Act in interpreted liberally to provide relief to persons whom the Act was designed to protect. *Id.*

**2. Sufficiency of Pleadings.**

The plaintiffs have alleged that Pulliam's indemnity contract with Peoples gave rise to a duty to Pulliam on the part of Ohio Casualty to investigate and defend under the Unfair Claims Settlement Practices Act. Some factual development is necessary to determine the validity of this allegation and whether that duty was breached. Because summary judgment is improper when the plaintiffs have not been granted adequate time for discovery, the court will not dismiss at this stage of the case. *See White's Landing Fisheries, Inc., v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994).

**B. Wrongful Attachment (Count II)(Ohio Casualty)**

Life insurance policies and IRA accounts may be exempt from judgment execution under K.R.S. 427.010 and 427.110. The statute of limitations for actions upon liability created by statute is five years. K.R.S. 413.120(2). This limitations period is inappropriate; the statutes creating the exemption from judgment do not specify a means of enforcement, so they do not create the liability. *See Wood v. Wingfield*, 816 S.W.2d 899, 904 (Ky. 1991)(applying this reasoning to the intestacy statute). The *Wood* Court reasoned that the ten-year limitations period in K.R.S. 413.160 (actions for relief not provided for by statute) rather than the five-year period in K.R.S. 413.120(7)(actions for injury to the rights of the plaintiff) applies to a claim against the administrator and heirs of the estate. *Id.* The administrator had allegedly injured the plaintiff; the heirs were merely the beneficiaries of that injury. The court found the five-year statute of limitations inapplicable because it implied that only the injuring party should be sued. *Id.*

In the present case, Pulliam has alleged a statutory right not to have his life insurance and IRA attached; this is similar to the right of the plaintiff in *Wood* to share in the estate under the intestacy statute. In the present case, unlike *Wood*, only the injuring party is a defendant to this claim. Therefore, the five-year limitations period in K.R.S. 413.120(7) applies to the claim for

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This section also serves as the basis for the plaintiffs' civil claims of theft by deception and engaging in organized crime.

wrongful attachment.

The plaintiffs state in their complaint that Ohio Casualty "attempted to garnish" the life insurance policy and IRA in 1993. Whether these are in the class of assets exempted from judgment and when garnishment actually occurred are questions that require factual development, thus prohibiting dismissal of these claims at this early stage in the case.

**C. Indemnity and Contribution (Count III)**

**1. Elements**

Indemnity is allowed when 1) the party who paid the judgment was only constructively liable in tort (as with vicarious liability) or 2) two parties are joint tortfeasors and the lesser seeks indemnity from the primary tortfeasor. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000).

KRS 412.030 allows "one who had satisfied a negligence claim to assert a claim for contribution in a separate action against a joint tortfeasor." *Degener,* 27 S.W.3d at 779.

**2. Statute of limitations and pleadings**

Indemnity and contribution are inappropriate here. The five-year statute of limitations in 412.120(7) applies to suits for indemnity and contribution. *Degener,* 27 S.W.3d at 782. The underlying suit for which the plaintiffs seek indemnity and contribution is *Barnett v. Peoples*, which was settled in 19889. Pulliam was found to be contractually liable in 1992. The Tampa complaint indicates that the plaintiffs were aware of their cause of action in April 1997; the statute of limitations began to run by that time. Because more than five years elapsed between April 1997 and the November 2002 filing of this case, the claims are time-barred.

In addition, assuming Pulliam obtained People's rights to indemnity and contribution through his contract, indemnity is inappropriate here. The plaintiffs have failed to allege that one of the defendants is a primary tortfeasor, and Peoples was not alleged to be vicariously liable for the acts of any of the defendants.

**D. Theft by Deception (Count VI)**

**1. Elements**

To prove theft by deception under K.R.S. 514.040,[29] a plaintiff must show that the defendant obtained the property of another by deception with intent to deprive that person of the property. Deception occurs when the defendant intentionally creates a false impression; conceals information affecting a decision to transact; or, as a fiduciary, fails to correct a false impression.

**2. Sufficiency of pleadings**

The plaintiffs have failed to plead any misrepresentations by any defendants other than King for reasons discussed under Count IV (RICO). The plaintiffs have also failed to allege that anyone induced another person to hand over property through the concealment of information or the failure to correct a false impression. The plaintiffs have further failed to allege that the Prudential defendants, First Union, Horn, U.S. Mortgage, or Nelson obtained the property of another. The theft claim against King by Pulliam is barred by *res judicata* because it could have been brought with reasonable diligence in the 1987 action. See discussion under Count XIII (Declaratory Judgment). Because the other plaintiffs were not parties to the a987 action, they are not similarly barred by *res judicata.*

**E. Engaging in Organized Crime (Count VII)**

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[29]K.R.S. 514.040, Theft by deception, states:

"(1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

(a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind;

(b) Prevents another from acquiring information which would affect judgment of a transaction;

(c) Fails to correct a false impression which the deceiver previously created of reinforced or which the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship; . . . „

**1. Elements**

To prove a claim of engaging in organized crime under K.R.S. 506.120[30], the plaintiffs must show that a defendant committed or conspired to commit theft[31] in collaboration with at least five other people on a continuing basis.[32]

**2. Sufficiency of pleadings**

The plaintiffs have pled one theft offense by King for

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17. K.R.S. 506.120, Engaging in organized crime, states:

"(1) A person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall not do any of the following: . . .

(e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

. . .

(3) As used in this section "criminal syndicate „means five (5) or more persons collaborating to promote or engage in any of the following on a continuing basis:

(a) Extortion or coercion in violation of 514.080 or 521.020; . . .

(c) Any theft offense as defined in KRS Chapter 514: . . . „

18. The plainiffs have not alleged extortion or coercion in violation of K.R.S. 514.080 or 532.020 despite repeatedly accusing King of "coercion. „The former section reuires threats to use force, commit a crime, accuse someone of a crime, expose secrets, or wrongfully use a public position. The latter requires bribery of an official.

19. The plaintiffs have alleged that the other defendants conspired to deny Pulliam his defenses to the Barnett action (¶ 37) but have not alleged that the other defendants were involved in the 1986 agreements between Pulliam and King.

reasons discussed under Count VI (Theft by Deception). The plaintiffs have alleged that defendant King collaborated with attorneys Strauss and Pritchett to induce Pulliam to sign the 1986 agreement (¶ 169). The plaintiffs have not alleged that anyone else conspired to commit this theft offense.[33] Because the plaintiffs have alleged only three members of the conspiracy, the plaintiffs have not pled the existence of a criminal syndicate of five or more persons. The plaintiffs have thus failed to plead the offense of engaging in organized crime.

**F. Fraud (Count VIII)**
**1. Elements**

Fraud requires 1) a material representation 2) which is false, 3) is known to be falsely or recklessly made, 4) is made to induce reliance, 5) is actually relied on, and 6) causes injury. *United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky. 1999).

**2. Sufficiency of pleadings**

The plaintiffs have failed to plead with particularity, as required by Rule 9(b), any fraud by and defendant other than King for the reasons discussed under Count I with regard to Pulliam, the fraud claim against King is barred by *res judicata;* Pulliam filed a complaint in 1987 against King alleging the same fraud. That case was settled and dismissed with prejudice by the state court, which upheld the validity of the settlement and dismissal in 1993. See discussion under Count XIII (Declaratory Judgment). The fraud claim is not barred with regard to the other plaintiffs since they were not parties to the 1988 settlement.

**G. Intentional Infliction of Emotional Distriss and Outrageous Conduct (Counts IX and X)**

**1. Elements**

Intentional infliction of emotional distress and outrage are

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20. The plaintiffs have alleged that the oether defendants conspired to deny Pulliam his defenses to the Barnett action (¶ 37) but have not alleged that the other defendants were involved in the 1986 agreements between Pulliam and King.

the same offense in Kentucky. *See Osborne v. Payne*, 31 S.W.3d 911, 913 (Ky. 2000). To prove either, the plaintiff must show 1) intentional or reckless conduct 2) that is "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality," 3) causation, and 4) severe emotional distress. *Id.* at 913-14.

**2. Sufficiency of pleadings**

Ordinary fraud does not rise to the level of outrageous conduct. *Osborne,* 31 S.W.3e at 914. Something more is required. Outrage has been likened to a criminal action for harassment. *Zurich Ins. Co. v. Mitchell,* 712 S.W.2d 340, 343 (Ky. 1986). The conduct must be of the kind that it "truly outrageous, intolerable and which results in bringing one to his knees." *Osborne,* 31 S.W.3d at 914.

The standard for outrage is very high, but the complaint has sufficiently alleged a violation. Because factual development is necessary to determine the validity of the plaintiffs' claims of outrage, the claims will not be dismissed at this stage of the case.

**H. Breach of Fiduciary Duty (Count XI)**

Pulliam has alleged a breach of fiduciary duty by King, as his accountant, in entering into a conflict-of-interest transaction in 1986. Pulliam claims to have "suffered the loss of his stock in Nelson Bancorp and Peoples, and the profits therefrom" (¶ 188). This claim is *res judicata* because of the 1988 judgment and 1993 denial of the motion. See discussion under Count XIII (Declaratory Judgment).

**1. *Debet et detinet* (Count XII)**

Pulliam is asking for $1,200 that Peoples owed to him in December 1986 as a result of the vote by the board of directors (¶¶ 191-193). The statute of limitations for actions on contracts not in writing is five years. K.R.S. 413.120(1). An action on a written contract must be brought within fifteen years. K.R.S. 413.090(2). An action for relief not provided for by statute must be brought within ten years. K.R.S. 413.160. However this claim is characterized, it is time-barred because the cause of action accrued in December 1986, more than fifteen years before the filing of this complaint.

In addition, in the 1988 Settlement Agreement, Pulliam

released "any claims Pulliam now has against the Bank and James O. King, Jr." (Exh. 1F) As discussed under Count XIII, the validity of the settlement agreement is *res judicata*. Because Pulliam's claim to the $1,200 existed at the time of the settlement agreement, it is barred by contract.

**J. Declaratory Judgment (Count XIII)**

Pulliam asks this court to set aside the 1988 settlement agreement with Peoples and King as the product of fraud, coercion, and lack of consideration. Pulliam challenged the validity of this settlement on the same grounds in his 1993 motion to set aside the judgment. The state court considered and denied Pulliam's allegations of fraud and coercion in inducing him to sign the a988 agreement. The state court's decision to uphold the settlement is *res judicata*.

"[W]here there is an identity of parties and an identity of causes of action, the doctrine [of *res judicata*] precludes further litigation of issues that were decided on the merits in a final judgment." *Whittaker v. Cecil*, 69 S.W.3d 69, 72 (Ky. 2002). *Res judicata* also precludes subsequent litigation of "matters that, with the exercise of reasonable diligence, might have been raised at the time." *Id.*

The alleged misrepresentations by the defendants subsequent to the signing of the settlement agreement do not affect the validity of the agreement – they had no impact on Pulliam's decision to sign. The same parties actually litigated and the state court decided the fraud, coercion, and consideration claims in 1993. The only current allegation not also made in 1993 concerning the conduct of the defendants prior to the signing is that King breached his fiduciary duty to Pulliam. The complaint indicates that Pulliam was aware of the facts underlying King's alleged conflict of interest in 1988. Pulliam could have, in the exercise of reasonable diligence, raised this claim in 1993. The validity of the settlement agreement is *res judicata*.

**K. Punitive Damages (Count XV of Amended Complaint)**

In intentional tort cases, conduct must be malicious, willful, or wanton in order to justify punitive damages. *Fowler v. Mantooth*, 683 S.W.2d 150, 252 (Ky. 1984). The plaintiff must prov the underlying action to receive punitive damages. *Id.* "In order to justify punitive damages [in a negligence case] there must be first a finding of failure to exercise reasonable care, and then an

additional finding that this negligence was accompanied by "wanton or reckless disregard for the lives, safety or property of others.'" *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-390 (Ky. 1985).

To the extent that the plaintiffs have sufficiently pled claims against the defendants, they may be able to recover punitive damages for those claims. Factual development is required to determine whether the plaintiffs can meet the standard for punitive damages; therefore, the punitive damage claim will not be dismissed.

**IV. Statute of Limitations**

**A. RICO and RICO conspiracy**

The statute of limitations for civil RICO claims is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (987). The statutory period begins to run when the party knows, or should have known through the exercise of reasonable diligence, that he has been injured. *Rotella,* 528 U.S. at 554-55 (rejecting "last predicate act" rule and "pattern discovery" rule for accrual). The statute of limitations begins to run when the injury is discovered, not at the time of a later predicate act.[34]

The plaintiffs have alleged that the defendants concealed the cause of action from them, preventing them from discovering their injury. Even if this court were to allow equitable tolling based on the concealment allegations, the plaintiffs were aware of the facts underlying their current allegations no later than April 1997, when they filed a complaint in the Middle District of Florida.

The plaintiffs argue that they were not aware of the facts allegedly concealed by the defendants until after receiving documents from Ohio Casualty during discovery. The fact that was allegedly concealed in that Prudential reimbursed Barnett in the amount of $282,500 prior to Barnett's 1989 complaint against Peoples; the plaintiffs allege that this payment demonstrates that Barnett had already recovered its damages from the Tibbitts fraud and that the suit against Peoples was an attempt to obtain a double recovery for its injuries. Ths plaintiffs allege that this fact would

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21. The *Rotella* Court diclined to consider whether the statute of limitations would be tolled where the second predicate act necessary to create a RICO claim occurred after the injury. 528 U.S. at 558 n. 4.

have provided Pulliam with a defense to the 1990 Ohio Casualty suit.

If the plaintiffs had not discovered that Barnett had been reimbursed by Prudential until after the documents production in 2000, their RICO claims would not be barred by the statute of limitations. The plaintiffs, however, were aware of the settlement between Prudential and Barnett when they filed a complaint against Ohio Casualty, Barnett, and the Prudential defendants in April 1997. The plaintiffs specifically alleged the following in paragraph 26w of the Tampa complaint:

> The fact that Defendant Ohio Casualty knew or should have known, that Defendant Barnett Bank had entered into a settlement agreement with Defendant Prudential, and that Peoples had alleged in the underlying action, that Defendant Barnett Bank had already received restitution from defendant Prudential and was attempting to secure "a double recovery from Peoples Bank."

The Tampa complaint demonstrates that the plaintiffs had actual knowledge of the Prudential-Barnett settlement in April 1997. *See New England Health Care Employees Pension Fund,* 336 F.3d at 501-02 (finding that prior complaint demonstrated either actual or constructive knowledge of fraud for purpose dismissal under Rule 12(b)(6) motion and statute of limitations). While the plaintiffs may not have known the exact amount of the settlement until 2000, the plaintiffs did know that Prudential had paid Barnett some amount as part of the settlement.

Because the plaintiffs discovered their injury by April 1997 at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. The instant action, however, was not filed until November 2002. Because the statute of limitations is four years, the plaintiffs are barred from pursuing a RICO claim for any injury that was discovered or should have been discovered by November 1998.

**B. State Claims**

Equitable tolling of the statute of limitations is justified "where a defendant conceals a plaintiff's cause of action so that it could not be discovered by the exercise of ordinary diligence on the plaintiff's part." *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 297 (Ky. App. 1993). Once the plaintiff discovers, or

should have discovered through ordinary diligence, the cause of action, the statute of limitations begins to run. The plaintiff may recover only for injuries arising inside the limitations period. *See Davis v. All Care Medical, Inc.*, 986 S.W.2d 902, 905 (Ky. 1999)(noting that Kentucky has not adopted continuing negligence theory and does not toll statute of limitations until date of last injury); *G & K Dairy v. Princeton Elec. Plant Bd.*, 781 F.Supp. 485, 488-89 (W.D. Ky. 1991)(citing Kentucky cases for proposition that injuries occurring outside statutory period are not actionable even if injury is ongoing).

The plaintiffs in the present case may recover damages only for injuries occurring within the relevant statutory periods. The Unfair Claims Settlement Practices Act claim (Count I), theft by deception claim (Count VI), and engaging in organized crime claim (Count VII) are all governed by the five-year limitations period in K.R.S. 413.120(2)(action upon liabilit5y created by statute). The wrongful attachment claim , as discussed under Count II, is governed by the five-year limitations period in K.R.S. 413.120(7)(action for an injury to the rights of the plaintiff). The indemnity and contribution claim is governed by the same statute of limitations, discussed under Count III.

The statute of limitations on the fraud claim (Count VIII) is five years. K.R.S. 413.120(12). The statute does not begin to run until discovery of the fraud. K.R.S. 413.130(3). The statute of limitations for outrage or intentional infliction of emotional distress is five years under K.R.S. 413.120(7). *See Craft v. Rice*, 671 S.W.2d 247, 251 (Ky. 1984). The statute of limitations on the *debit et detinet* claim has fun, as discussed under Count XII.

For reasons discussed under the RICO statute of limitations section, the statute of limitations has run on Counts ! And VI-X for any injury arising more than five years before the filing of the present complaint (before November 10, 1997).

**Injuries Occurring Outside the Limitations Period**

Injuries resulting from Ohio Casualty's attachment of Pulliam's income and bank account (¶¶ 39-46) are barred by the RICO statute of limitations to the extent that Ohio Casualty obtained the property prior to November 10, 1988, and by the state statutes of limitations to the extent that Ohio Casualty obtained the property prior to November 10, 1997. Other injuries barred by the statutes of limitations include the following: the seizure of the stock of Pulliam and Janice Pulliam to the extent that Ohio Casualty permanently seized the stock prior ro November 10, 1997

(¶ 47); the abandonment of Kerry Pulliam's insurance practice in 1993 as a result of adverse publicity (¶ 58); the diminished value of the property Sims sold to the Nelson County Board of Education in 1994 (¶¶ 71, 73); injury resulting from Sims & Kerry Pulliam's being forced to negotiate a new mortgage in 1996 (¶¶ 75-76); Ohio Casualty's cancellation of its contract with Whitehouse & Pulliam (which occurred prior to April 1997)(¶ 79; Tampa complaint ¶ 70)' Ohio Casualty's seizure of W & J Pulliam, Inc. stock certificates representing 37.5% of the stock of Chaplin Insurance Agency to the extent that Ohio Casualty permanently seized the stock prior to November 10, 1997 (¶ 83); indemnity or contribution for the 1989 settlement agreement between Peoples and Barnett, on which Pulliam became liable in 1992; and the $1,200 director fee not paid to Pullliam, including interest on that fee (¶¶ 194-95).

The alleged injuries that this court has not found barred by the statute of limitations are: Garnishments by Ohio Casualty within the limitations periods; other "financial loss, mental anguish, emotional distress, upset and harm" arising within the limitations periods (¶¶ 54, 60, 77, 84, 130, 177); costs associated with defending the state court action arising within the limitations periods (¶¶ 81, 84); and wrongful attachment of the life insurance policy and IRA to the extent attachment occurred within the limitations period (¶ 137).

**V. Conclusion**

With regard to Count IV (Rico)(¶¶ 141-57) and Count V (RICO Conspiracy)(¶¶ 158-61), the plaintiffs' claims are dismissed as to all the defendants. Count III (Indemnity and Contribution)(¶¶ 138-40) is dismissed with regard to all the defendants. Count VI (Theft by Deception)(¶¶ 162-64) is dismissed with regard to all the defendants except King; plaintiff Pulliam's claim against defendant King is dismissed. Count VII (Engaging in Organized Crime)(¶¶ 165-67) is dismissed with regard to all defendants/ Count VIII (Fraud)(¶¶ 168-74) is dismissed with regard to all defendants except King; plaintiff Pullliam's claim against defendant King is dismissed. Plaintiff Pulliam's claim against defendant King under Count XI (Breach of Fiduciary Duty)(¶¶ 183-89) is dismissed. Plaintiff Pulliam's claim against defendant Peoples under Count XII (*Debet et Detinet*)(¶¶ 190-95) is dismissed. Plaintiff Pulliam's claim against defendant King under Count XIII (Declaratory Judgment)(¶¶ 196-99) is dismissed.

Count I (Unfair Claims Settlement Practices Act)(¶¶ 102-32) against defendant Ohio Casualty remains with regard to all the

plaintiffs. Plaintiff Pulliam's claim against defendant Ohio Casualty under Count II (Wrongful Attachment)(¶¶ 133-37) remains. The claim against King under Count VI (Theft by Deception)(¶¶ 162-64) remains for all plaintiffs except Pulliam. The claim against King under Count VIII (Fraud)(¶¶ 168-74) remains for all plaintiffs except Pulliam. The claims against all the defendants under Count IX (Intentional Infliction of Emotional Distress)(¶¶ 175-78) and Count X (Outrageous Conduct)(¶¶ 179-82) remain with regard to all plaintiffs. The claim under Count XIV of the first amended complaint (Declaratory Judgment--Video Communications, Inc., Stock)(¶¶ 200-21) remains; the validity of this claim is not before the court on the defendants' motions to dismiss. The claim against all defendants under Count XV of the first amended complaint (Punitive Damages)(¶¶ 222-24) remains with regard to all plaintiffs.

Damages for injuries arising from the defendants' conduct are barred t the extent that the injuries occurred outside the statutory limitations periods, as discussed in section IV (Statute of Limitations).

This action involves non-diverse parties – all of the plaintiffs and five of the defendants are citizens of Kentucky (¶¶ 7-16, 22-27) The case was removed from state court based on the federal question jurisdiction created by the RICO claims pursuant to 28 U.S.C. § 1331. Because the RICO claims have been dismissed for failure to plead a RICO violation, this court will remand the action to the Nelson Circuit Court.[35]

Accordingly,

**IT IS ORDERED THAT** the plaintiffs' submission docketed as "First Amended Complaint" (Docket No. 72) be **CONSTRUED** as a motion for leave to file an amended complaint and that the motion for leave to file is **GRANTED.**

**IT IS FURTHER ORDERED THAT** the motions to dismiss or, in the alternative, motions for summary judgment of defendants King, Peoples, and Nelson (Docket no. 1), the Prudential defendants (Docket No. 3), defendant Barnett (Docket

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22. This court is permitted to keep this case pursuant to supplemental jurisdiction but declines to do so. *See* 28 U.S.C. § 1367 (c)(3) (allowing the district court to decline to exercise supplemental jurisdiction where it "has dismissed all claims over whhich it has original jurisdiction ).

No. 12), defendant First Union (Docket No. 19), and defendant Ohio Casualty (Docket No. 69) be **CONSTRUED** as motions to dismiss or, in the alternative, for summary judgment on the plaintiffs' original complaint and so much of the plaintiffs' amended complaint as is identical to the plaintiffs' original complaint.

**IT IS FURTHER ORDERED THAT** the defendants' motions to dismiss or, in the alternative, for summary judgment are **GRANTED IN PART** and **DENIED IN PART,** as set forth in the order.

**IT IS FURTHER ORDERED THAT** the remaining state claims are **REMANDED** to the Nelson Circuit Court.

**IT IS FURTHER ORDERED THAT** the plaintiffs' motion to continue (Docket No. 4) is **DENIED AS MOOT.**

This is the 24th day of September, 2003.

Jennifer B. Coffman, Judge
United States District Court
Western District of Kentucky

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**LOUISVILLE DIVISION**

**CIVIL ACTION NO. 02-747-C**

**PAUL A. SIMS, ET AL.,** **PLAINTIFFS**

**V.** **ORDER**

**OHIO CASUALTY INSURANCE COMPANY, ET AL.,** **DEFENDANTS**

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On December 13, 2002, the defendants removed the present action from the Nelson Circuit Court to this court based on federal question jurisdiction. On September 15, 2003, this court entered an order dismissing the plaintiffs' claims in part, including the plaintiffs' federal claims, and remanding the remaining state law claims to the Nelson Circuit Court (Docket No. 74). This matter is not before the court on the motion of defendants Prudential Insurance Co. of America and Prudential-Bache Securities, Inc. (the "Prudential defendants") for an extension of time to answer the amended complaint and to alter the court's order (Docket No. 80); the motion of defendants Peoples State Bank, Nelson Bancorp, Inc., and James O. King. Jr., to for an extension of time to answer the amended complaint ant to alter the order (Docket No. 81); the motion of defendant First Union Bank, N.A., for an extension of time to answer the amended complaint (Docket No. 82); the motion of defendant First Union for reconsideration (Docket No. 83); the motion of defendant Barnett Bank of Tampa, N.A., for an extension of time to answer the amended complaint (Docket No. 84); the motion of defendant Barnett Bank to dismiss the first amended complaint (Docket No. 85); the motion of defendant Barnett Bank to alter the judgment (Docket No. 86); the motion of the Prudential defendants to dismiss the first amended complaint (Docket No. 87); and the motion of defendants {Peoples[;es State Bank, Nelson Bancorp, and James O. King, Jr., to dismiss the first amended complaint or in the alternative for summary judgment (Docket No. 88). The plaintiffs have filed a motion to reconsider in the Nelson Circuit Court.

**I. Subject Matter Jurisdiction**

The plaintiffs argue that the court found they had failed to state a claim under federal law, that they consequently lacked standing to bring their RICO claims and, therefore, that this court lacked subject matter jurisdiction over this case. In a related argument, the plaintiffs also contend that the court found the plaintiffs' federal claims so insubstantial that the court lacked subject matter jurisdiction over the case. For the reasons stated in the court's prior order and the reasons stated below, this court in its discretion ordered the case remanded after finding that the plaintiffs had failed to state a federal claim under RICO, not because this court lacked subject matter jurisdiction over the case.[36] The court will address the standing argument first.

**A. Standing**

The plaintiffs appear to equate constitutional standing with statutory standing under RICO. Constitutional standing requires an injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For standing to sue under RICO, the plaintiff must show injury resulting from alleged predicate acts constituting a RICO violation. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985); *J.S. Serv. Ctr. v. Gen. Elec. Technical Serv.*, 937 F. Supp. 216, 220 (S.D.N.Y. 1996); *Yancoski v. E.F. Hutton & Co., Inc.*, 581 F.Supp. 88, 96 (E.D. Pa. 1983). Lack of RICO standing does not equate to lack of constitutional standing, nor is lack of RICO standing even sufficient to bar the district court from exercising supplemental jurisdiction over state law claims, as the Second Circuit explicitly held in *Lerner v. Fleet Bank, N.A.*:

> We hold that lack of RICO standing does not divest the district court of jurisdiction over the action, because RICO standing, unlike other standing doctrines, is sufficiently intertwined with the merits of the RICO claim that such a rule would turn the underlying merits questions into jurisdictional issues. . . . Finally, we find the district court may, in its discretion, exercise

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1. The court notes the existence of some inconsistency in the plaintiffs' arguments that their RICO claims are so insubstantial that this court lacks federal question jurisdiction and jurisdiction under standing grounds in light of the plaintiffs' motion in state court to reinstate these same "wholly insubstantial RICO claims.

> supplemental jurisdiction over the state-law claims in [one of the cases before the court] because RICO standing is not a jurisdictional prerequisite the absence of which would divest the district court of the original jurisdiction required to support supplemental jurisdiction.

318 F.3d 113, 117 (2d Cir. 2002)(finding that lack of proximate cause between RICO predicate acts and plaintiff's injury did not preclude constitutional standing); *Jersevic v. Kuhl,* 2002 WL 84624 (E.D. Mich. 2002)(finding constitutional standing despite plaintiff's failure to state a claim under RICO); *see also Bell v. Hood,* 327 U.S. 678, 681-82 (1946)("[Subject matter jurisdiction] is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a case of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

The court found that the plaintiffs failed to state a claim under RICO; the plaintiffs, therefore, lack RICO standing. The court did not find, and does not find, that the plaintiffs lack constitutional standing – the plaintiffs have presented an injury-in-fact, causation, and redressability sufficient to satisfy the constitutional requirements.[37] The dismissal of all federal claims for failure to state a claim did not divest this court of jurisdiction on standing grounds.

**B. "Wholly Insubstantial" Claims**

The plaintiffs also argue that the court's remand of the case should have been under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction rather than 28 U.S.C. § 1367(c)(#). In its order or remand, the court found that it did retain the discretion to exercise supplemental jurisdiction over the remaining state claims under 28 U.S.C. § 1367 but declined to exercise that jurisdiction and remanded under subsection (c)(3). (Remand Order at 33 n. 22) The clear implication of this finding was that the court did have subject matter jurisdiction over the action by virtue of the dismissed federal claims. The plaintiffs argue that this finding was in error.

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2. The court does not take the plaintiffs' argument to mean that they have suffered no redressable, cognizable injury at the hands of the defendants.

As the *Bell* Court noted, a ruling that the plaintiff has failed to state a federal claim generally does not divest the court of jurisdiction where such a dismissal is on the merits, rather than for want of jurisdiction. 327 U.S. at 682. A claim is dismissed for lack of jurisdiction "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83. On the other hand, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89 (1998)(quoting *Bell,* 327 U.S. at 685). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim in proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, of otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.,* 523 U.S. at 89 (citation omitted).

The plaintiffs argue that, based on the court's order the RICO claims were "wholly insubstantial and frivolous" and failed to survive to a facial attack on subject matter jurisdiction. *See Ohio Nat. Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir. 1990). While the complaint ultimately failed to plead a RICO claim, the court did not find and need not have found the plaintiff's RICO claim "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *See Blount Financial Services, Inc. v. Walter E. Heller & Co.,* 819 F.2d 151, 152-53 (6th Cir. 1987)(dismissing RICO claims under Rule 12(b)(6) after finding failure to plead fraud). While the plaintiffs did not attempt to argue any novel or difficult questions of law regarding the validity of the RICO claims (with the possible exception of the level of particularity required in pleading),[38] the court nevertheless

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[38]Rather than addressing whether they had pled the RICO fraud requirements with the particularity required under Rule 9(b) or requesting leave to amend their complaint to cure any deficiencies, the plaintiffs argued only that the particularity requirement of Rule 9(b) did not apply to them. (Response to Prudential defendants' motion to dismiss at 24-32; Docket No. 20) The plaintiffs directly addressed the defendant's arguments concerning the substance of the RICO pleadings for the first time

had to construe the bounds of the RICO elements to determine whether the plaintiffs stated a RICO claim. The court was required to determine which of the alleged statements in the plaintiff's extensive factual allegations could legally be considered "misrepresentations," which alleged actions by the plaintiffs or others could legally be considered to have been taken in reliance on any alleged representations, and whet her the defendants legally could be considered to have been acting through an enterprise – that is, which schemes or associations could legally be considered an enterprise.[39] This analysis was not merely a rote or mechanical application of RICO elements but required the court to delve into the details of the complaint to determine whether the plaintiffs had stated a RICO claim. For example, the court was required to consider the import of the activities of Prudential's agents, Tibbitts and Mirzaian; though the court perhaps stated its conclusion inartfully, the court determined that the plaintiffs could not piggy-back their present conspiracy allegations on tenuous connection withy the Tibbitts/Mirzaian fraud and conspiracy. Such consideration of the details of the allegations and how the law should be applied to those allegations is inconsistent with a facial challenge to subject matter jurisdiction although certainly consistent with a dismissal for failure to state a claim under Rule 12(b)(6) or a failure to plead. The court properly found the existence of subject matter jurisdiction.

**II. Authority to Reconsider Order**

Title 28, section 1447(d) of the Untied States Code states: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise [unless the case was removed pursuant to section 1443]."

The plaintiffs argue that the language of this section bars the court from reconsidering its order. The term "otherwise" in section 1447(d) includes reconsideration by the district court. *See In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996). If this prohibition in section 1447(d) applied to the present remand order, this court

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only in their motion to reconsider, filed in state court.

4. This detailed consideration required of the plaintiffs' RICO pleadings under 18 U.S.C. § 1962(c) is to be contrasted to the absence of any arguable allegation of injury fromt he use of racketeering income under § 1962(a) and the court's corresponding summary handling of that potential claim.

would be barred from reconsidering the order. The section does not apply in this case, however. District courts are required to remand a case to the state court from which it was removed "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). The Supreme Court has held that subsections (c) and (d)'s prohibition on review of remand orders applies *only* to orders remanding the case based on improvident removal or lack of jurisdiction, as under subsection (c). *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 336, 345-46 (1976); *see Long v. Bando Mfg. of America, Inc.*, 201 F.3d 754, 758-59 (6th Cir. 2000)(finding that court was not divested of jurisdiction to hear appeal where district court had not remanded for lack of subject matter jurisdiction). This court remanded in its discretion under 28 U.S.C. § 1367, not for improper removal or lack or subject matter jurisdiction; appellate review of the order, therefore, is not barred by § 1447(d). Because the court of appeals has authority to review the court's order of remand, this court finds that it likewise has authority to reconsider the order.

**III. State Law Claims**

The court will construe the plaintiffs' objection to the court's jurisdiction as a motion to reconsider the court's decision on the various state claims.[40] The court concludes that, having decided to dismiss the federal claims upon which its jurisdiction rested, it erred in ruling on the state law claims rather than leaving those claims for the consideration of the state court. *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255 (6th Cir. 1996)(discussing the "strong presumption in favor of dismissing supplemental claims"). The court will amend the order to remove the discussion of the plaintiffs' state law claims.

Accordingly,

**IT IS ORDERED** that the plaintiffs' objections to this court's subject matter jurisdiction (Docket No. 90, et seq.) Are **CONSTRUED** as a motion to reconsider the court's ruling on the state law claims for improper exercise of jurisdiction. The motion is **GRANTED** and the portion of the original order discussing the

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5. The plaintiffs have chosen not to ask this court to reconsider its ruling on the federal claims. The court, therefore, need not reconsider that ruling or address the merits of the federal claims.

state law claims is rescinded. The court will issue separately an amended order.

**IT IS FURTHER ORDERED** that the defendants' motions to reconsider or to amend the order (Docket Nos. 80, 81, 83, 86) are **DENIED.** The defendants' motions for extensions of time to answer the first amended complaint (Docket Nos. 80, 81, 82, 84, 85, 87, 88) are **DENIED AS MOOT.**

Signed on July 16, 2004

Jennifer B. Coffman, Judge
United States District Court

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**LOUISVILLE DIVISION**

**CIVIL ACTION NO. 02-747-C**

**PAUL A. SIMS, ET AL.,.....PLAINTIFFS**

**V.** **AMENDED ORDER**

**OHIO CASUALTY INSURANCE COMPANY, ET AL.,.....DEFENDANTS**

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## I. Introduction

This matter is before the court on the motions to dismiss or in the alternative for summary judgment of defendants James O. King, Jr. ("King"); Peoples State Bank, Chaplin, Kentucky ("Peoples"); and Nelson Bancorp, Inc., (Docket No. 1); defendants Prudential Insurance Co. of America and Prudential-Bache Securities, Inc. ("the Prudential defendants")(Docket No. 3); defendant Barnett Bank of Tampa ("Barnett")(Docket No. 12): defendant First Union Bank ("First Union")(Docket No. 19); and defendant Ohio Casualty Insurance Co. ("Ohio Casualty")(Docket No. 69) and on the plaintiffs' motion to continue (Docket No. 4).

The plaintiffs in this case are Paul Sims ("Sims"); Warren Pulliam ("Pulliam"); Janice Pulliam; W & J Pulliam, Inc.; Chaplin Insurance Agency, Inc.; and Kerry Pulliam (collectively "the plaintiffs"). The defendants in this case are Ohio Casualty; Nelson Bancorp, Inc.; Peoples; King; Barnett; the Prudential defendants; U.S. Mortgage & Trust Company, Inc. ("U.S. Mortgage"); and J.R. Horn ("Horn"); and First Union (collectively "the defendants").

The plaintiffs seek recovery against all the defendants for RICO violations (Count IV0, RICO Conspiracy (Count V), indemnity and contribution (Count iii), theft by deception (Count VI), engaging in organized crime (Count VII), fraud (Count VIII), intentional infliction of emotional distress (Count IX), outrageous conduct (Count X), and punitive damages (Count XIV). The plaintiffs seek a recovery from Ohio Casualty under the Unfair

Claims Settlement Practices Act (Count I). Pulliam seeks damages from King for breach of fiduciary duty (Count XI) and a declaratory judgment concerning the February 25, 1988 contract between Pulliam and King(Count XIII). Pulliam also seeks a recovery from Peoples for an amount Peoples allegedly failed to pay him in 1986 (Count XII).

II. Statement of the Case

From December 1985 to December 1986, Donald Tibbitts ("Tibbitts") and Benham Mirzaian, Agents of Prudential. engaged in schemes to defraud Prudential, its customers, and other financial institutions ("the Tibbitts scheme")(¶ 122k-n, p-ee)[41] As part of the scheme, Tibbitts allegedly used his position at Prudential to obtain a substantial investment from the Peoples board and to procure loans from Barnett using fraudulent letters of credit; Tibbitts also allegedly gave bad checks to Peoples, created substantial overdrafts at Peoples, and wired money from Barnett to Peoples to cover the overdrafts. *Id.* Pulliam was president of Peoples at the time of the Tibitts scheme. In 1990, Pulliam was convicted of one count of bank fraud and three counts of aiding and abetting for his participation (certifying checks) in the Tibbitts scheme. (Criminal Judgment, Exhibit to Motion to Dismiss of Defendants Peoples, King and Nelson Bancorp 1C).[42]

**A. The Restitution Agreements between Peoples and Pulliam**

On December 17, 1986 (after the Tibbitts scheme was uncovered), King, a director of Peoples, allegedly induced Pulliam to sign a restitution agreement guaranteeing that Pulliam would indemnify Peoples for any losses arising from Pulliam's actions in

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1. A paragraph number without more indicates that the allegations come from the plaintiffs' 2002 complaint.

[42]"A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice. *New England Health Care Employees Pension Fund v. Ernst & Young LLP*, 336 F.3d 495, 501-02 (6th Cir. 2003)(allowing the use of a complaint from a prior fraud case to prove that plaintiff had actual or constructive knowledge of the facts underlying the claim as of the date of the prior complaint).

connection with the scheme. King also allegedly induced Pulliam to sign a separate option agreement giving King the option to buy all of Pulliam's stock at below market value, to tender his stock certificates to Peoples, and to resign as president of Peoples. Pulliam claims that the agreements are void because of lack of consideration, misrepresentations by King, duress, and King's breach of fiduciary duty. (¶¶ 38t-v, 169a-i, 170-73, 184-87).[43]

On December 18, 1987, Pulliam filed an action against Peoples and King in Nelson Circuit Court, 87-CI-395, seeking rescission of these December 17, 1986, agreements based on lack of consideration, fraud, and duress (Exh. 1E). This action culminated in a settlement agreement on February 25, 1988, in which Pulliam admitted to causing overdrafts on accounts at Peoples; agreed to remain liable to Peoples for losses, specifically including any claims by Barnett, arising from Pulliam's conduct in connection with the Tibbitts scheme; and agreed to release King and Peoples from all claims "relating to in any way the claims which are of could have been the subject of the suit and any claims Pulliam now has against the Bank and James O. King, Jr." (Exh. 1F). The court accepted the settlement agreement and dismissed the action with prejudice on February 25, 1988 (Exh. 1H).

Pulliam claims that the settlement agreement is invalid because King, in collusion with Ohio Casualty, coerced him to sign it (¶¶ 92, 169j). Pulliam argued the same grounds in his 1993 motion in state court to set aside the Nelson Circuit Court judgment under C.R. 60.02; Pulliam claimed that King and Peoples had fraudulently induced him to sign the settlement agreement by concealing the pending claim of Ohio Casualty (Exh. 1J; see Trial Court's findings, Exh. 1D). The court denied the motion in December 1993, finding that Pulliam had not been misled and noting that three years was an unreasonable delay in filing the motion (Exh. 1D). The plaintiffs have made no relevant new allegations, beyond those made to the Nelson Circuit Court, concerning the validity of the Peoples-Pulliam settlement

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[43]This is the first time that Pulliam has expressly claimed a fiduciary breach by King; however, the q987 complaint and the 1993 motion to set aside judgment make it clear that Pulliam was aware of the alleged fiduciary breach long ago. The other claims are alleged in ¶ 26t-v of a substantially similar complaint filed by the same plaintiffs in the Middle District of Florida in 1997 ("Tampa complaint )(Exhibit to Motion to Dismiss of Defendant Ohio Casualty 69 K) and the 1987 Complaint (Exh. 1E).

agreement.

**B. The Barnett Settlement**

On February 1, 1988, Barnett filed a suit against Peoples in Jefferson Circuit Court, 99-CI-00812, seeking reimbursement for sums it had wrongfully paid to Peoples as a result of Pulliam's role in the Tibbitts scheme (¶ 109). Barnett asserted in paragraph 28 of its complaint against Peoples that Prudential-Bache refused to make good on letters of credit, resulting in a $562,000 loss to Barnett (¶ 122; Exh. 1F). In 1989. Barnett disclosed documents to Peoples (and Ohio Casualty) indicating that Barnett had actually entered into a 1987 settlement with Prudential under which Barnett received $282,500 in reimbursement (¶ 99). As part of the settlement, Prudential had agreed not to "treat any other lending institution more favorably that . . . Barnett" (¶ 122ff). Despite its knowledge of the Prudential agreement, Peoples settled with Barnett on October 12, 1989 (¶ 100). Pulliam never intervened in the action.

The plaintiffs allege that Peoples and Ohio Casualty breached their duty to Pulliam by failing to defend *Barnett v. Peoples,* failing to tender him the defense, expressly refusing to disclose settlement terms to Pulliam and get his consent, and failing to disclose the Prudential settlement to him (¶¶ 38a, h. i-n, ee, 88-90, 101, 118-120). The plaintiffs allege that Barnett knowingly misrepresented to the court that it had not received a $282,500 reimbursement from Prudential (¶¶ 38r, 99. 122i-j), that Ohio Casualty and Peoples knew or should have known of the reimbursement and that Barnett was attempting to get a double recovery (¶¶ 38w, 99), and that the Prudential settlement provided an absolute defense in the Barnett action (W 101).[44] The plaintiffs claim that Barnett and Peoples failed to implead Pulliam even though he was an indispensable party (¶¶ 86-87); that First Union's wrongful refusal to honor a check was the cause of Barnett's injuries (¶ 122f); that Barnett failed to assert claims against First Union and Barnett's insurer, Aetna (¶ 122g, h); that the Prudential agents were the culpable parties (¶ 122 k-n, p-

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4. In paragraph 26w of the Tampa complaint, the plaintiffs likewise claimed that "Ohio Casualty knew, or should have known, that Barnett Bank had entered into a settlement agreement with Prudential and the Peoples had alleged in the underlying action that Barnett Bank had already received restitution from Prudential and was attempting to secure a 'couble recovery from Peoples Bank' „ (Exh. 69K).

ee); and that Prudential agreed to give favorable treatment to Barnett (¶ 122ff). The plaintiffs claim generally that the defendants are all involved in a conspiracy to defraud the plaintiffs by concealing the available defenses to the 1988 Barnett claim.

Ohio Casualty paid the settlement on behalf of Peoples (Order denying motion to set aside 1992 judgment, 69E). On September 27, 1989, Peoples assigned to Ohio Casualty its right to indemnification from Pulliam. *Id.* On May 25, 1990, Ohio Casualty filed suit against Pulliam in the western District of Kentucky, C-90-0367-L-A, seeking indemnification for the $225,000.82 it allegedly paid Barnett under the settlement (¶ 34). In July, 1992, the jury returned a verdict for Ohio Casualty in the amount of $200,000 (¶ 36). The plaintiffs allege that this judgment was improper because of the defects in the Barnett settlement; that Peoples could not validly assign the indemnity contract (¶ 38c, d); that Ohio Casualty and Peoples failed to demand apportionment of liability in the Barnett suit (¶ 38p); that Ohio Casualty failed to seek judgments against Prudential and others (¶¶ 38aa-cc, 122o);[45] that Ohio Casualty failed to execute against collateral held by Peoples (¶ 139); that Ohio Casualty was in complete control of the defense to the Barnett action (¶¶ 106, 111, 113); and that Ohio Casualty failed to conduct an adequate investigation before settling the Barnett action (¶ 139).

In October 1995, Pulliam filed a motion to set aside this 1992 verdict, alleging that Ohio Casualty had failed to tender to Pulliam the defense of the Barnett action; that the indemnity contract was not assignable; that Jefferson County was an improper venue for *Barnett v. Peoples;* and that the agreed settlement resulted from fraud and collusion. (Pulliam's Memorandum in Support of the Motion to Set Aside, Exh. 69D, at 151-52). The Jefferson Circuit Court denied all of these claims (Order Denying Motion to Set Aside 1992 Judgment, 69E, at 428-29).

On April 12, 1993, Ohio Casualty filed an enforcement action in the Nelson Circuit Court, Action 93-CI-00130, seeking to set aside allegedly fraudulent conveyances made by Pulliam (¶ 50). This action is still pending (¶ 51). In addition to this action, from February 8 to December 10, 1993, Ohio Casualty levied against the income and property of Pulliam, including the joint bank

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5. The plaintiffs made the same allegations of failure to seek apportionment and failure to recover from other paties in paragraphs 26p and aa-cc of the Tampa complaint.

account of Pulliam and Janice Pulliam; filed lis pendens against property bought by Sims and Kerry Pulliam from W & J Pulliam, Inc.[46]; seized W & J Pulliam, Inc. stock representing 37.5% of the stock of Chaplin Insurance Agency[47]; and caused other related harms (¶¶ 39-83). The plaintiffs claim financial harm, mental anguish, and emotional distress as a result of the pending legal actions (¶ 84).

In April 1997, the plaintiffs filed a complaint in the Middle District of Florida, 97-846-CV-T-17-A, against Ohio Casualty, Barnett, and Prudential alleging substantially the same facts as the complaint before this court (Exh. 69K).

In 2002, the plaintiffs filed a motion to file an amended answer and counterclaim in the Nelson Circuit Court action, 93-CI-00130 (Exh. 1K). The allegations in the proposed amended answer are the same as the allegations made in the current complaint, See *id.* the plaintiffs stated that the facts underlying the counterclaims were unknown to them until after document production on July 14, 2000, and subsequent depositions clarifying the meaning of the documents. *Id.* The plaintiffs further stated that the facts could not have been discovered earlier through due diligence because Ohio Casualty deliberately concealed them. *Id.* After the state court denied the ,motion (Exh. 1L0, the plaintiffs filed the current action.

**C. Claims Not Related to the Central Facts.**

Under Count II, the plaintiffs allege that Ohio Casualty attached an IRA and a life insurance policy in violation of state law in 1993 (¶¶ 134-136). Under Count XII, the plaintiffs allege that the directors of Peoples voted to pay each director $1,200 for services on or about December 1, 1986; Pulliam was a director at the time but was never paid (¶¶ 191-193).

**III. Federal Claims**

**A. RICO (Count IV)**

**1. Elements**

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6.W & J Pulliam, Inc., appears to be owned and operated by Pulliam and Janice Pulliam.

7. Chaplin Insurance Agency is also known as Whitehouse & Pulliam Insurance Agency and is owned in part by Pulliam (¶ 29).

The plaintiffs have alleged violations of an unspecified subsection of 18 U.S.C. § 1962. To prove a violation of RICO under 18 U.S.C. § 1962(a), the plaintiffs must show injury caused by the use of income derived from a pattern of racketeering *Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir. 1990). To prove a violation of § 1962(b), the plaintiffs must show that a defendant acquired or maintained an interest in an enterprise through racketeering. *ADVOCACY Organization for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 328-29 (6th Cir. 1999). The plaintiffs have alleged neither injury from use of the income nor acquisition of an interest through racketeering by any defendant, so the court focuses its discussion on § 1962(c).[48]

Section 1962(c) requires that 1) a person 2) associated with an enterprise engaged in interstate commerce 3) participate in the conduct of the affairs of the enterprise 4) through a pattern of racketeering.

The person accused of the violation and the enterprise must be separate and distinct entities. *Cedric Kusher Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001). Under 18 U.S.C. § 1961(4), "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." If the enterprise is not a legally recognized entity, then the plaintiffs must allege an association-in-fact. "To satisfy the enterprise requirement, an association in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages." *Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir. 1993)(citing *United States v. Turkette*, 452 U.S. 576, 583 )1981). Some sort of organizational structure or chain of command is required; this takes simple conspiracies out of the scope of RICO. *vanDerBroeck v. Common Point Mortgage Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000).

In order to participate in the conduct of the affairs of the

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8. To the extent that King acquired an interest in an enterprise through his 1986 option to purchase stock of Nelson, any alleged injury from this purchase became complete in 1988 then King exercised the optioin. Pulliam was aware of the alleged fraud and coercion surrounding the 1986 agreement in 1987 when he filed his complaint against Peoples and King. An claim based on this injury is barred by the four-year statute of limitations on RICO claims in *Agency Holding Corp v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987), as discussed in section IV (Statute of Limitations).

enterprise, a person must participate in the "operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993).

Under 18 U.S.C. § 1961(5), a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." The plaintiffs allege as predicate acts satisfying this requirement the following crimes listed in 18 U.S.C. § 1961(1): bank fraud,[49] wire fraud,[50] and extortion under the Hobbs Act.[51]

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9. 18 U.S.C. § 1344, Bank Fraud, states:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice–(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; . . . „

10. 18 U.S.C. § 1343, Fraud by wire, radio, or television, states:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . . . „

[51] 18 U.S.C. § 1951, Interference with commerce by threats or violence, states:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person pr property in furtherance of a plan or purpose to do anything in violation of this section . . .

**2. Sufficiency of pleadings**

*a. Enterprise and conduct of affairs*

With the exception of Ohio Casualty and King, the plaintiffs have failed to allege an enterprise with which the defendants are associated. A plaintiff must plead precisely the enterprise alleged in a RICO claim. *See Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989). The plaintiffs allege generally that each of the corporate defendants is an enterprise. In order to state a claim under RICO, the plaintiff must allege that a defendant participates in the conduct of affairs of an enterprise that is separate from the defendant itself. A corporation does not violate RICO by participating in the conduct of its own affairs. The complaint fails to allege that any defendant other than Peoples is an enterprise whose affairs have been conducted by other persons. It is not a RICO violation for Peoples to conduct its own affairs. With regard to the other defendants, the plaintiffs have alleged that Ohio Casualty and King have been involved in the conduct of the affairs of Peoples – Ohio Casualty during the Barnett settlement negotiations only and King as an employee of Peoples. The plaintiffs have failed to allege such conduct by the other defendants.

The plaintiffs also have not alleged an association-in-fact among the defendants sufficient to create an enterprise. They have failed to allege any kind of organizational structure among the defendants independent of the alleged "pattern of racketeering." The "enterprise" and "participation in the conduct of affairs" elements have been sufficiently alleged only with regard to King and Ohio Casualty; for this reason, the RICO claims against the other defendants fail.

*B. Racketeering activities*

Rule 9(b) of the Federal Rules of Civil Procedure requires fraud claims to be pled with particularity. This pleading requirement applies to fraud claims under RICO. *See Blount*

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. . .

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. „

*Financial Services, Inc., v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987)(requiring a RICO complaint alleging mail fraud to "state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact.") In *Rotella v. Wood*, the Supreme Court noted that Rule 11(b)(3) does give plaintiffs some latitude to make factual allegations that they believe can be proved after discovery; the Court, however, did not excuse the plaintiffs from the pleading requirements in Rule 9(b). 528 U.S. 549, 561 (2000). Rule 9(b) does not apply to the Hobbs Act claims, but the pleadings must still be sufficient to put the defendants on notice.

The plaintiffs have failed to allege two predicate acts by any of the defendants. The plaintiffs have alleged only one predicate act by King. the plaintiffs allege that King made fraudulent misrepresentations in 1986 concerning his intention to aid Pulliam and that Pulliam relied on the misrepresentation in entering into the q986 agreements (¶¶ 169-72). The plaintiffs have alleged no other misrepresentations by King. The plaintiffs do allege numerous times that King coerced Pulliam to sign the 1986 agreement (¶ 169a,g,h) and the 1988 settlement agreement (¶ 92)(alleging also that Ohio Casualty conspired to coerce Pulliam). In claiming coercion, the plaintiffs do not, however, allege any "wrongful use of actual or threatened force, violence, or fear" sufficient to state a claim for extortion under the Hobbs Act.[52] Because they allege only one predicate act, the plaintiffs have failed to state a claim for a RICO violation by King.

The plaintiffs have failed to plead with particularity fraud by any defendant other than King. In a civil RICO case based on mail fraud, the Sixth Circuit stated that a plaintiff "must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact." *Blount Financial Services,* 819 F2d at 152. The plaintiffs plead one misrepresentation by Barnett – the statement in paragraph 28 of the 1988 complaint that Prudential had refused to make good on letters of credit leading to a loss for Barnett (¶122i-j). The plaintiffs' complaint, however, indicates that there was no reliance on the

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[52]In ¶ 92, the plaintiffs allege that Ohio Casualty conspired with King to induce and coerce Pulliam to sign the q988 settlement agreement. An extortion claim against Ohio Casualty also fails for lack of an allegation of wrongful use of threatened force.

misrepresentation (¶ 38w).("Peoples had alleged in the underlying complaint that Barnett had already received restitution from Prudential.") Even if the plaintiffs had alleged reliance on this misrepresentation, they would still have pled only one predicate act by Barnett.

The plaintiffs have alleged one act of misrepresentation by a First Union agent in orally agreeing to honor a check that it later refused to honor (¶ 122f). The plaintiffs have not alleged any reliance by Barnett on that promise; because no reliance has been alleged, the plaintiffs have failed to allege fraud by First Union. The plaintiffs have also failed to allege th at First Union obtained any property of someone else through its predicate acts as required to state a claim under the wire and bank fraud statutes. The plaintiffs have not alleged any other predicate acts by First Union so they have failed to state a claim for a RICO violation.

The plaintiffs have alleged no misrepresentations by the Prudential defendants, only fraud by Prudential agents Tibbitts and Mirzaian. The plaintiffs have not alleged that the Prudential defendants should be liable for the actions of Tibbitts and Mirzaian; the plaintiffs have only nebulously alleged concealment of facts. Even if the plaintiffs had sufficiently alleged liability for the actions of the agents, the Prudential defendants would not be liable for RICO violations because the plaintiffs have failed to plead an enterprise separate from the corporate defendant. *See Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993)("an organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself.").

The plaintiffs have alleged no misrepresentations by Horn, U.S. Mortgage, Peoples, Nelson, or Ohio Casualty. Because the plaintiffs have failed to plead either two predicate acts or an enterprise for each defendant, the plaintiffs have failed to state a claim for a violation of RICO against any of the defendants.

**B. RICO Conspiracy (Count V)**

To prove a violation of § 1962(d),[53] a plaintiff must prove that the overt act in furtherance of the conspiracy is itself a RICO violation. *Beck v. Prupis*, 529 U.S. 494, 505-06 (2000). Where a

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[53]18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. „

plaintiff has failed to allege a violation of § 1962(a)-(c), a conspiracy claim under § 1962 also fails. *See Miller v. Norfolk Southern Ry. Co.*, 183 F.Supp.2d 996, 1003 (N.D. Ohio 2002)(citing cases from other circuits). Because the plaintiffs have failed to state a claim for a RICO violation by any of the defendants, they have failed to state a RICO conspiracy claim.

**IV. Statute of Limitations**

**A. RICO and RICO conspiracy**

The statute of limitations for civil RICO claims is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (987). The statutory period begins to run when the party knows, or should have known through the exercise of reasonable diligence, that he has been injured. *Rotella*, 528 U.S. at 554-55 (rejecting "last predicate act" rule and "pattern discovery" rule for accrual). The statute of limitations begins to run when the injury is discovered, not at the time of a later predicate act.[54]

The plaintiffs have alleged that the defendants concealed the cause of action from them, preventing them from discovering their injury. Even if this court were to allow equitable tolling based on the concealment allegations, the plaintiffs were aware of the facts underlying their current allegations no later than April 1997, when they filed a complaint in the Middle District of Florida.

The plaintiffs argue that they were not aware of the facts allegedly concealed by the defendants until after receiving documents from Ohio Casualty during discovery. The fact that was allegedly concealed in that Prudential reimbursed Barnett in the amount of $282,500 prior to Barnett's 1989 complaint against Peoples; the plaintiffs allege that this payment demonstrates that Barnett had already recovered its damages from the Tibbitts fraud and that the suit against Peoples was an attempt to obtain a double recovery for its injuries. Ths plaintiffs allege that this fact would have provided Pulliam with a defense to the 1990 Ohio Casualty suit.

If the plaintiffs had not discovered that Barnett had been reimbursed by Prudential until after the documents production in

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21. The *Rotella* Court declined to consider whether the statute of limitations would be tolled where the second predicate act necessary to create a RICO claim occurred after the injury. 528 U.S. at 558 n. 4.

2000, their RICO claims would not be barred by the statute of limitations. The plaintiffs, however, were aware of the settlement between Prudential and Barnett when they filed a complaint against Ohio Casualty, Barnett, and the Prudential defendants in April 1997. The plaintiffs specifically alleged the following in paragraph 26w of the Tampa complaint:

> The fact that Defendant Ohio Casualty knew or should have known, that Defendant Barnett Bank had entered into a settlement agreement with Defendant Prudential, and that Peoples had alleged in the underlying action, that Defendant Barnett Bank had already received restitution from defendant Prudential and was attempting to secure "a double recovery from Peoples Bank."

The Tampa complaint demonstrates that the plaintiffs had actual knowledge of the Prudential-Barnett settlement in April 1997. *See New England Health Care Employees Pension Fund,* 336 F.3d at 501-02 (finding that prior complaint demonstrated either actual or constructive knowledge of fraud for purpose dismissal under Rule 12(b)(6) motion and statute of limitations). While the plaintiffs may not have known the exact amount of the settlement until 2000, the plaintiffs did know that Prudential had paid Barnett some amount as part of the settlement.

Because the plaintiffs discovered their injury by April 1997 at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. The instant action, however, was not filed until November 2002. Because the statute of limitations is four years, the plaintiffs are barred from pursuing a RICO claim for any injury that was discovered or should have been discovered by November 1998.

**IV. State Claims**

With regard to Count IV (Rico)(¶¶ 141-57) and Count V (RICO Conspiracy)(¶¶ 158-61), the plaintiffs' claims are dismissed as to all the defendants. This action involves non-diverse parties – all of the plaintiffs and five of the defendants are citizens of Kentucky (¶¶ 7-16, 22-27) The case was removed from state court based on the federal question jurisdiction created by the RICO claims pursuant to 28 U.S.C. § 1331. Because the court has decided to dismiss all the federal claims, the court will exercise its discretion to remand the action to the Nelson Circuit Court for

consideration of the plaintiffs' state claims.[55] Accordingly,

**IT IS ORDERED THAT** the plaintiffs' submission docketed as "First Amended Complaint" (Docket No. 72) be **CONSTRUED** as a motion for leave to file an amended complaint and that the motion for leave to file is **GRANTED.**

**IT IS FURTHER ORDERED THAT** the motions to dismiss or, in the alternative, motions for summary judgment of defendants King, Peoples, and Nelson (Docket no. 1), the Prudential defendants (Docket No. 3), defendant Barnett (Docket No. 12), defendant First Union (Docket No. 19), and defendant Ohio Casualty (Docket No. 69) be **CONSTRUED** as motions to dismiss or, in the alternative, for summary judgment on the plaintiffs' original complaint and so much of the plaintiffs' amended complaint as is identical to the plaintiffs' original complaint.

**IT IS FURTHER ORDERED THAT** the defendants' motions to dismiss or, in the alternative, for summary judgment are **GRANTED IN PART** and **DENIED IN PART,** as set forth in the order.

**IT IS FURTHER ORDERED THAT** the remaining state claims are **REMANDED** to the Nelson Circuit Court.

**IT IS FURTHER ORDERED THAT** the plaintiffs' motion to continue (Docket No. 4) is **DENIED AS MOOT.**

Signed on July 16, 2004

Jennifer B. Coffman
United States District Court

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22. This court is permitted to keep this case pursuant to supplemental jurisdiction but declines to do so. *See* 28 U.S.C. § 1367 (c)(3) (allowing the district court to decline to exercise supplemental jurisdiction where it "has dismissed all claims over whhich it has original jurisdiction ),

No. 03-6398

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | |
|---|---|
| PAUL A. SIMS; WARREN L. PULLIAM; JANICE L. PULLIAM; CHAPLIN INSURANCE AGENCY, INC.; W & J PULLIAM, INC.; KERRY W. PULLIAM, | ) |
| Plaintiffs-Appellants | ) |
| | )ON APPEAL FROM THE |
| | )UNITED STATES DISTRICT |
| | )COURT FOR THE WESTERN |
| v. | )DISTRICT OF KENTUCKY |
| THE OHIO CASUALTY INSURANCE COMPANY; NELSON BANCORP, INC.; PEOPLE'S STATE BANK; JAMES O. KING, JR.; BARNETT BANK OF TAMPA, N.A./, also known as Bank of America; PRUDENTIAL INSURANCE COMPANY OF AMERICA; PRUDENTIAL BACHE-SECURITIES, INC., also known as Prudential Securities, Incorporated; U.S. MORTGAGE & TRUST COMPANY, INC.; J.R. HORN, also known as Marion A. Horn; FIRST UNION BANK, N.A., also known as Wachovia Bank, N.A.; UNKNOWN DEFENDANTS ATLANTA NATIONAL BANK, also known as Wachovia Bank | ) |

**Defendants-Appellees )**

**Before: BOGGS, Chief Judge; and GIBBONS, Circuit Judge.*[56]**

**JULIA SMITH GIBBONS, Circuit Judge.** In the mid-1980s, two agents of Prudential Insurance Company defrauded Prudential and various other financial institutions. Plaintiff-appellant Warren Pulliam assisted in the fraud by using his position as President of defendant-appellee People's State Bank to certify checks and allow overdrafts at People's on the two agents' accounts when he knew that there were insufficient funds in the accounts to cover those checks. Pulliam was charged criminally and then convicted for his role in the scheme. He signed a settlement agreement with People's and defendant-appellee James King, a director of People's. agreeing to reimburse People's for the loss. Other banks subsequently sued People's for the losses they incurred. Defendant-appellee Ohio Casualty Insurance Company eventually paid a settlement on behalf of People's. Ohio Casualty sued Pulliam to recoup the amount that it paid in the settlement and obtained a $200,000 jury verdict. In 2002, Pulliam and the other plaintiffs-appellants (collectively "plaintiffs) filed suit in Kentucky state court against Ohio Casualty, People's, Prudential, King, and the other defendants-appellees in this action, claiming that the $200,000 judgment awarded to Ohio Casualty was obtained in violation of various Kentucky state law provisions and in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq*. The case was removed to the federal district court. The district court dismissed the plaintiffs' case for failure to state a claim under RICO and failure to comply with the RICO statute of limitations. It also resolved some of the state law claims. Upon motion of the plaintiffs, the district court vacated the portion of its opinion addressing the state law claims and remanded those claims to the Kentucky state court. The plaintiffs filed a notice of appeal from the district court's first opinion, challenging its conclusions on the federal claims (which did not change in the altered opinion). For the following reasons, we affirm the district court's decision.

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* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, was present for oral argument, but subsequently recused himself from this case. He tool no part in the court's consideration of decision of the case.

I.

The plaintiffs first argue that this court does not have jurisdiction to hear their appeal because the district court did not address all of their claims, such as their claim for declaratory judgment. In this case, the district court remanded all remaining claims back to the state court. "The remand ends further action by the district court." *In re Romulus Cmty. Sch.*, 729 F.2d 431, 440 (6th Cir. 1984). The order is therefore a final judgment pursuant to 28 U.S.C. § 1291. *Id.* at 440-41.

II.

The plaintiffs next challenge the district court's conclusion that their RICO claims were barred by the statute of limitations. They contend that the limitations period should not have begun to run because the defendants concealed the pertinent facts necessary for the plaintiffs to know that they had a RICO claim.

The Supreme Court has imposed a four-year statute of limitations on RICO claims. *agency Holding Corp. V. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987). The four-year period begins to run when a party knew, or through exercise of reasonable diligence should have discovered, that the party was injured by a RICO violation. *Rotella v. Wood*, 582 U.S. 549, 553-55 (2000).

The plaintiffs' complaint bases their RICO claims on the actions of People's and King in making Pulliam sigh a restitution agreement and option agreement, the actions of People's and King in entering into a 1988 settlement agreement with Pulliam, the actions of People's and Barnett Bank in settling Barnett's claim against People's, and the actions of Ohio Casualty in paying People's settlement with Barnett and subsequently obtaining a jury verdict against Pulliam. They allege that People's and Ohio Casualty did not disclose the terms of the settlement reached between People's and Barnett and that Ohio Casualty failed to properly defend the Barnett action, eventually causing Pulliam to incur liability. Thus, the sum of plaintiffs' RICO claims is that the defendants colluded to deny Pulliam the right to assert his defenses, cross-claims, and counterclaims in the 1992 federal lawsuit brought by Ohio Casualty against Pulliam.

The plaintiffs argue on appeal that they did not know the amount of money Prudential had paid Barnett in a settlement and thus could not ascertain whether the sum recovered from Prudential by Barnett was available as a set-off for the amount

Barnett sought to recover from People's/ Because of this alleged concealment, the plaintiffs claim that they could not have learned of the facts underlying their cause of action until July 14, 2000, when Ohio Casualty produced a copy of the settlement agreement, or until April 17, 2002, when the plaintiffs were able to verify the authenticity of the settlement agreement.

Despite the plaintiffs' contentions, the district court correctly held that their RICO claims were barred by the applicable statute of limitations. In April, 1997, the plaintiffs filed a lawsuit in the Middle District of Florida against Ohio Casualty, Barnett, and the Prudential companies. That lawsuit alleged RICO violations and RICO conspiracy. In the complaint, the plaintiffs alleged that the Ohio Casualty judgment obtained in 1992 against Pulliam "was a direct and proximate result of the conspiracy and collusion of the defendants" to prevent Pulliam from asserting "his available defenses, cross-claims, and counter-claims." Specifically, the plaintiffs referenced the various facts, including that People's and Ohio Casualty entered into a settlement with Barnett and that People's did not assert the defenses available to it against Barnett, forming the basis for the plaintiffs' current lawsuit before this court.

Thus, although it is likely that the plaintiffs knew of the facts underlying their RICO claims as early as q992 when Ohio Casualty obtained a judgment against Pulliam, at a minimum it is evident that the 1997 Middle District of Florida litigation set forth RICO claims based on the same underlying facts as presented in the current case. While the exact amount of the settlement between Ohio Casualty or People's and Barnett may not have been known until 2000, the plaintiffs had the necessary information to file RICO claims in at least 1997, as evidenced by the fact that they did file a lawsuit under RICO at that time. As this court has held, "the running of the statute of limitations begins when a plaintiff is put on inquiry notice–that is, when the plaintiff has been presented with evidence suggesting the possibility of fraud." *Isaak Trumbull Sav. & Loan Co.*, 169 F.3d 390, 399 (6th Cir. 1999)(quotation marks and citation omitted). A plaintiff need only be aware of "storm warnings" but does not need to "hear[] thunder and see[] lightning." *Id.* Even if the plaintiffs did not know the exact amount of the settlement, such detail was unnecessary as the plaintiffs certainly were aware of the "storm warnings" underlying their RICO charges. As this court's precedent makes clear, the plaintiffs heed not be aware of every minute fact underlying their RICO claims. The district court correctly concluded that the statute of limitations period ended in April 2001 at the latest and that the

plaintiffs' complaint filed in November 2002 was untimely.[57]

III.

Next, the plaintiffs contend that the district court should have granted them leave to amend the complaint to cure the defects identified by the district court in determining that the complaint did not state a federal cause of action. Initially, we note that the plaintiffs never sought leave to amend their complaint. The district court was not required to offer the plaintiffs the opportunity to amend their complaint in lieu of dismissing it. *See Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 784 (6th Cir. 2000)(noting that "the granting of a defendant's motion to dismiss does not ordinarily afford the unsuccessful plaintiffs any 'opportunity to further clarify their allegations' with proof and evidence."). Moreover, even if the plaintiffs had moved to amend, the district court could have properly denied their motion. The plaintiffs' complaint was filed outside the statute of limitations period for RICO claims, and no amendment could have cured this defect.

IV.

Finally, the plaintiffs contend that the case should be remanded to the district court because, as they concede, defendants J.R. Horn and the United States Mortgage & Trust Company were not properly served with process. The plaintiffs were responsible for obtaining proper service on these parties and have not, before this appeal, argued that they were not properly served. They cannot now use this argument to obtain further review of their case by the district court. In any event, Horn and United States Mortgage & Trust Company would be entitled to raise the arguments advanced by the other defendants in this case, namely that the plaintiffs' RICO claims were barred by the statute of limitations. We affirm the district court's dismissal of the plaintiffs' complaint as to these two defendants.

V.

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1. Because we conclude that the statute of limitations bars the plaintiffs' RICO claims, we need not address the plaintiffs' argument that the district court erred in holding that the plaintiffs failed to state a claim in their complaint for RICO violations

For the foregoing reasons, we affirm the district court's decision dismissing the plaintiffs' complaint.

No. 03-6398

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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| PAUL A. SIMS; WARREN L. PULLIAM; JANICE L. PULLIAM; CHAPLIN INSURANCE AGENCY, INC.; W & J PULLIAM, INC.; KERRY W. PULLIAM, | ) | |
| Plaintiffs-Appellants | ) | |
| | ) | ON APPEAL FROM THE |
| | ) | UNITED STATES DISTRICT |
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| THE OHIO CASUALTY INSURANCE COMPANY; NELSON BANCORP, INC.; PEOPLE'S STATE BANK; JAMES O. KING, JR.; BARNETT BANK OF TAMPA, N.A./, also known as Bank of America; PRUDENTIAL INSURANCE COMPANY OF AMERICA; PRUDENTIAL BACHE-SECURITIES, INC., also known as Prudential Securities, Incorporated; U.S. MORTGAGE & TRUST COMPANY, INC.; J.R. HORN, also known as Marion A. Horn; FIRST UNION BANK, N.A., also known as Wachovia Bank, N.A.; UNKNOWN DEFENDANTS ATLANTA NATIONAL BANK, also known as Wachovia Bank | ) | AMENDED |

**Defendants-Appellees )**

**Before: BOGGS, Chief Judge; and GIBBONS, Circuit Judge.*[58]**

**JULIA SMITH GIBBONS, Circuit Judge.** In the mid-1980s, two agents of Prudential Insurance Company defrauded Prudential and various other financial institutions. Plaintiff-appellant Warren Pulliam assisted in the fraud by using his position as President of defendant-appellee People's State Bank to certify checks and allow overdrafts at People's on the two agents' accounts when he knew that there were insufficient funds in the accounts to cover those checks. Pulliam was charged criminally and then convicted for his role in the scheme. He signed a settlement agreement with People's and defendant-appellee James King, a director of People's. agreeing to reimburse People's for the loss. Other banks subsequently sued People's for the losses they incurred. Defendant-appellee Ohio Casualty Insurance Company eventually paid a settlement on behalf of People's. Ohio Casualty sued Pulliam to recoup the amount that it paid in the settlement and obtained a $200,000 jury verdict. In 2002, Pulliam and the other plaintiffs-appellants (collectively "plaintiffs) filed suit in Kentucky state court against Ohio Casualty, People's, Prudential, King, and the other defendants-appellees in this action, claiming that the $200,000 judgment awarded to Ohio Casualty was obtained in violation of various Kentucky state law provisions and in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq*. The case was removed to the federal district court. The district court dismissed the plaintiffs'

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* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, was present for oral argument, but subsequently recused himself from this case. He tool no part in the court's consideration or decision of the case. Nevertheless, we are still able to decide this case. *See Leaman v. Ohio Dep't of Mental Retardation & Dev. Disabilitye*s, 825 F.2d 946, 948-50 (6th Cir. 1987)(en banc)(concluding that one judge's recusal after oral artument in an en banc case did not prevent deciding the merits of the appeal; *see also Benzon v. Morgan Stanley Distribs., Inc.*, –F.3d –, 2005 WL 2000927 (6th Cir. Aug 22, 2005)(deciding case with two-judge panel when third judge "was present at oral argument but did not take part in the consideration or decision of the case ); *United States v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994)(deciding case with two judges as one judge who was present for oral argument "took no part in its final disposition ); *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1131 (D.C. Cir. 1994)(same); *United States v. Trammel*, 899 F.2d 1483, 1484 (6th Cir. 1990)(deciding case with two-judge panel after third judge who was present for oral argument resigned).

case for failure to state a claim under RICO and failure to comply with the RICO statute of limitations. It also resolved some of the state law claims. Upon motion of the plaintiffs, the district court vacated the portion of its opinion addressing the state law claims and remanded those claims to the Kentucky state court. The plaintiffs filed a notice of appeal from the district court's first opinion, challenging its conclusions on the federal claims (which did not change in the altered opinion). For the following reasons, we affirm the district court's decision.

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Finally, the plaintiffs contend that the case should be remanded to the district court because, as they concede, defendants J.R. Horn and the United States Mortgage & Trust Company were not properly served with process. The plaintiffs were responsible for obtaining proper service on these parties and have not, before this appeal, argued that they were not properly served. They cannot now use this argument to obtain further review of their case by the

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district court. In any event, Horn and United States Mortgage & Trust Company would be entitled to raise the arguments advanced by the other defendants in this case, namely that the plaintiffs' RICO claims were barred by the statute of limitations. We affirm the district court's dismissal of the plaintiffs' complaint as to these two defendants.

V.

For the foregoing reasons, we affirm the district court's decision dismissing the plaintiffs' complaint.

No. 03-6398

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| PAUL A. SIMS, ET AL., | ) | |
| | ) | |
| Plaintiffs-Appellants, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| THE OHIO CASUALTY COMPANY, ET AL., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

**BEFORE:** BOGGS, Chief Judge; GIBBONS, Circuit Judge.

The court having received a petition fo rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

Leonard Green, Clerk

FILED
JUL 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1547

# In the Supreme Court of the United States

PAUL A. SIMS, et al.,

*Petitioners*,

v.

OHIO CASUALTY INSUANCE COMPANY, PRUDENTIAL INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL; FIRST UNION BANK OF TAMPA, N.A. a/k/a WACHOVIA BANK; BARNETT BANK OF TAMPA, N.A. a/k/a BANK OF AMERICA; JAMES O. KING, JR.; PEOPLES STATE BANK OF CHAPLIN KENTUCKY a/k/a KING SOUTHERN BANK; NELSON BANCORP, INC., J.R. HORN a/k/a MARION HORN, JR.; and UNITED STATES MORTGAGE AND TRUST COMPANY, INC.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF IN OPPOSITION

WILLIAM W. ALLEN
*Counsel of Record*
GESS MATTINGLY & ATCHISON, P.S.C.
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(859) 252-9000
*Counsel for Respondents The Prudential Insurance Company of America and Prudential Equity Group, LLC*

Becker Gallagher Legal Publishing, Inc.

## CORPORATE DISCLOSURE STATEMENT

Respondent The Prudential Insurance Company of America is an indirect wholly-owned subsidiary of Prudential Financial, Inc. Respondent Prudential Equity Group, LLC (f/k/a Prudential-Bache Securities, Inc. and Prudential Securities Incorporated) is an indirect wholly-owned subsidiary of Prudential Financial, Inc.

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## PRUDENTIAL RESPONDENTS' BRIEF IN OPPOSITION

Respondents The Prudential Insurance Company of America and Prudential Equity Group, LLC (f/k/a Prudential-Bache Securities, Inc. and Prudential Securities Incorporated) (the "Prudential Respondents") respectfully urge this Court to deny the Petition for a Writ of Certiorari seeking review of the Amended Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit issued on October 12, 2005, which affirmed the Order of the United States District Court for the Western District of Kentucky issued on September 25, 2003, as amended by the Order entered on July 16, 2004.

The Prudential Respondents do not accept the Petitioners' statement of the case and recital of the facts of the case but instead adopt the Court of Appeals' recitation of the facts in its Amended Opinion issued on October 12, 2005.

In addition, the Prudential Respondents submit this brief in opposition to correct a misstatement of fact in the Petition pursuant to Rule 15(2) of the Rules of the Supreme Court. The Petitioners allege, at page 13 of the Petition, that Counsel of Record for the Prudential Respondents actively participated in a conspiracy to conceal a settlement agreement from the Petitioners by affirmatively denying the existence of the settlement agreement. That allegation is utterly false and devoid of evidentiary support.

The Petitioners have failed to state an issue worthy of review by this Court. Accordingly, the Court should deny the Writ.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

William W. Allen
*Counsel of Record*
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